[Cite as *Crase v. Shasta Beverages, Inc.*, 2012-Ohio-326.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Alden E. Crase,	:	
Plaintiff-Appellant,	:	
		No. 11AP-519
v.	:	(C.P.C. No. 10CVH-04-6496)
Shasta Beverages, Inc. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on January 31, 2012

The Behal Law Group, *LLC*, and *John M. Gonzales*; *O'Reilly*, *Fortune & Associates*, *LLC*, and *Wesley T. Fortune*, for appellant.

Porter, *Wright*, *Morris & Arthur*, and *Charles C. Warner*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, Alden E. Crase, appeals from the judgment of the Franklin County Court of Common Pleas granting the motions for summary judgment filed by defendants-appellees, Shasta Beverages, Inc., National Beverage Corp., Monte Hale,

and Nicholas Inboden, on all claims contained in appellant's complaint. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} Appellant was born on July 6, 1948, and began working for Shasta Beverage Corporation ("Shasta") in 1969.[1] During his employment at Shasta, appellant held several positions not only within the company, but, also, in various locations throughout the country. At the time of his termination on January 25, 2010, appellant was a production supervisor at the Shasta plant in Obetz, Ohio. Appellant was informed that his employment was being terminated due to his removal of an oxygen tank from the plant on December 12, 2009.

{¶3} According to appellant, on December 12, 2009, his 81-year old friend, Dewey, was having breathing problems. Dewey did not want to go to the hospital, nor did he want appellant to call for an emergency squad. Therefore, appellant decided to utilize the oxygen unit kept at the plant. Appellant testified that he entered the plant, removed the oxygen unit, and took it to Dewey's house to administer oxygen. The plant's security alarm began sounding, and because he did not have a security code, appellant was unable to turn off the alarm. Appellant returned the oxygen tank the following day, and, according to appellant, the alarm was still sounding. Though appellant testified at his deposition that he initiated telephone calls to three Shasta employees prior to removing the oxygen unit, appellant did not actually speak with anyone or otherwise obtain permission to remove the oxygen unit.

[1] National Beverage Corporation is a holding company for several subsidiaries, including Shasta. For ease of discussion, we will refer only to Shasta throughout this decision.

{¶4} Appellant did speak with fellow production supervisor at the Obetz plant, Inboden, on the afternoon appellant returned the oxygen tank, and Inboden provided appellant with the security code for the security alarm. However, appellant stated he chose not to attempt to use the code and returned home. According to appellant, he spoke with Inboden on Monday morning about removing the oxygen unit. Inboden testified that he told only fellow employee Bruce Harlan about the unit's removal and that he did not tell plant manager, Hale, his direct supervisor.

{¶5} Hale discovered the oxygen unit's removal a few weeks later while conducting a safety audit. According to Hale's deposition, he discovered a variance in the oxygen level, and, thereafter, asked Inboden if he knew why there was less oxygen in the unit. Upon inquiry, Hale learned that appellant had removed the oxygen unit from the plant. Hale asked Inboden to prepare a written statement reflecting what he knew about the unit's removal. On January 14, 2010, after an argument between appellant and payroll processor, Rhonda Brogley, regarding appellant's bereavement leave, Hale talked with appellant. During the conversation, Hale asked appellant if he removed a piece of safety equipment from the plant, and appellant replied, "I did." (Appellant's deposition, 130-31.) After appellant explained why he had done so, Hale instructed appellant to leave for the day and placed appellant on investigatory leave. Upon discussion with the director of human resources, David Tomanio, National BevPak's executive vice president, John Munroe, and other management and human resources personnel, the decision was made to terminate appellant's employment. Appellant testified that on January 25, 2010, Tomanio advised him that his employment at Shasta was terminated. According to

appellant, Tomanio informed appellant that he "was being terminated for removing the oxygen unit out of the plant." (Appellant's deposition, 136.)

{¶6} Though an initial complaint was filed on April 28, 2010, after the conclusion of various procedural matters, an amended complaint was filed on January 24, 2011, asserting claims for: (1) breach of contract; (2) age discrimination; (3) public policy; (4) fraud, misrepresentation, and promissory estoppel; and (5) defamation. Pursuant to Civ.R. 56, appellees sought summary judgment on all claims. After briefing, the trial court granted judgment as a matter of law in favor of appellees on all claims asserted in the complaint.

{¶7} This appeal followed and appellant brings the following five assignments of error for our review:

> I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM OF AGE DISCRIMINATION.
>
> II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S BREACH OF CONTRACT CLAIM; ALTERNATIVELY, THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S PROMISS (SIC) ESTOPPEL CLAIM.
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> III. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S PUBLIC POLICY CLAIM.
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> IV. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FRAUD OR MISREPRESENTATION CLAIM.
>
> V. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S DEFAMATION CLAIM.

{¶8} All of appellant's assignments of error challenge the trial court's ruling on appellees' motions for summary judgment; therefore, we begin by setting forth the applicable standard of review for Civ.R. 56 proceedings. We review the trial court's grant of summary judgment de novo. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in a light most favorable to the nonmoving party. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd*., 78 Ohio St.3d 181, 1997-Ohio-221.

{¶9} Under summary judgment motion practice, the moving party bears an initial burden to inform the trial court of the basis for its motion and to point to portions of the record that indicate that there are no genuine issues of material fact on a material element of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107. Once the moving party has met its initial burden, the nonmoving party must produce competent evidence establishing the existence of a genuine issue for trial. Id.

{¶10} By his first assignment of error, appellant contends the trial court erred in concluding that appellant failed to demonstrate the reason for terminating his employment was merely a pretext for age discrimination. R.C. 4112.02 provides that it shall be unlawful discriminatory practice, "[f]or any employer, because of the * * * age * * * of any person, 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." R.C. 4112.02(A).

{¶11} Absent direct evidence of discrimination, Ohio courts resolve age discrimination claims using the evidentiary framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817. *Wigglesworth v. Mettler Toledo Internatl., Inc*., 10th Dist. No. 09AP-411, 2010-Ohio-1019, ¶16, citing *Kohmescher v. Kroger Co*. (1991), 61 Ohio St.3d 501; *Barker v. Scovill, Inc*. (1983), 6 Ohio St.3d 146, 147-48. Under that framework, the plaintiff bears the initial burden of establishing a prima facie case of age discrimination. Id. at 148. To do so, the plaintiff must demonstrate that he or she: "(1) was a member of the statutorily protected class, (2) was discharged, (3) was qualified for the position, and (4) was replaced by, or the discharge permitted the retention of, a person of substantially younger age." *Coryell v. Bank One Trust Co. N.A*., 101 Ohio St.3d 175, 2004-Ohio-723, paragraph one of the syllabus. If a plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for its discharge of the plaintiff. *Barker* at 148; *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm*. (1981), 66 Ohio St.2d 192, 197. Should the employer carry this burden, the plaintiff must then prove that the reasons the employer offered were not its true reasons, but merely a pretext for discrimination. *Barker* at 148; *Plumbers & Steamfitters Joint Apprenticeship Commt*. at 198. "Pretext may be proved either by direct evidence that [an impermissible] animus motivated the discharge or by discrediting the employer's rebuttal evidence." Id.

{¶12} In order to refute the employer's legitimate, nondiscriminatory reason offered to justify an adverse employment action and establish that the reason is merely pretext, a plaintiff is required to show either that the proffered reason: (1) has no basis in fact; (2) did not actually motivate the defendant's challenged conduct; or (3) was insufficient to warrant the challenged conduct. *Kundz v. AT&T Solutions, Inc.*, 10th Dist. No. 05AP-1045, 2007-Ohio-1462, ¶32, citing *Hoffman v. CHSHO, Inc.,* 12th Dist. No. CA2004-09-072, 2005-Ohio-3909, ¶26. In essence, appellant must show that appellees' " 'business decision' was so lacking in merit as to call into question its genuineness." *Hartsel v. Keys* (C.A.6, 1996), 87 F.3d 795, 800.

{¶13} The trial court concluded that appellant set forth sufficient evidence to prove a prima facie case of age discrimination. Appellees, however, contend this finding was in error. According to appellees, because appellant failed to produce any evidence that he was replaced by a person of substantially younger age, he failed to establish a prima facie case of age discrimination. Assuming, without deciding, that appellant established a prima facie case of age discrimination, summary judgment would still have been appropriate here because appellant failed to present evidence that appellees' articulated reason for his employment termination was a pretext for unlawful discrimination. *Kundz* at ¶30 (because the plaintiff was unable to establish employer's reason for termination was pretextual, it is not necessary to decide whether the plaintiff has in fact established a prima face case of age discrimination); see also *Eddings v. LeFevour* (N.D.Ill., Sept. 29, 2000), No. 98 C 7968 (because plaintiff cannot establish employer's reasons for failing to promote were pretextual, it is not necessary to decide whether plaintiff has in fact established a prima facie case of discrimination); *Morris v. Vanderburgh Cty. Health Dept.*

(C.A.7, 2003), 58 Fed.Appx. 654, 656 (where the issue of whether plaintiff presented a prima facie case overlaps with issue of pretext, appellate court need not consider the issue of a prima facie case and will proceed to decide whether plaintiff established pretext).

{¶14} Appellees asserted in the trial court, as they do before us, that appellant's employment was terminated due to his removing the oxygen unit from the plant. Thus, appellees articulated a legitimate, nondiscriminatory reason for its discharge of appellant. To establish pretext, appellant does not argue that this proffered reason has no basis in fact, nor does he argue the proffered reason did not actually motivate the action. Rather, appellant argues the proffered reason was insufficient to motivate the adverse action. We disagree.

{¶15} First, we note it is undisputed that Shasta's employee handbook includes a list of prohibited activities that could lead to "immediate termination." Included in that list is "failing to observe safety rules, or safe practices, or tampering with a safety device." The handbook states that the severity of corrective action depends in part on the nature of the violation and may range from verbal counseling to dismissal. Additionally, Shasta's work rules, instituted in 2006, state that employees who violate the employer's work rules and regulations will be disciplined and may include "disciplinary action up to and including discharge from employment for the first offense." As are relevant here, the rules of conduct which are deemed sufficient cause for disciplinary action include: (1) unauthorized possession of company property; (2) deliberate misuse of or unauthorized use of company supplies, materials, machines or tooling; (3) violation of sanitary or safety rules; and (4) tampering with or mishandling any equipment.

{¶16} There is no dispute that appellant had notice of the above-articulated rules and that the rules were in effect at the time appellant removed the oxygen unit from the plant. Therefore, it has clearly been established that the removal of the oxygen unit from the plant could be sufficient to motivate a decision to terminate one's employment at Shasta.

{¶17} To establish pretext, appellant directs us to email correspondence between Munroe and Tomanio in which Munroe expresses his opinion that "I think he should get a week off without pay with a clear understanding that any further disappearances, harassing and unprofessional communications or taking company property (especially safety equipment) will result in his immediate termination." (Appellant's Brief, 37.) While Tomanio responded that appellant could be given "one more chance," Tomanio went on to state "[t]he oxygen thing like I said before really bothers me. Even as a first time offense." (Appellant's Brief, 37-38.) Contrary to appellant's suggestion, this evidence does not establish that removal of company property was not sufficient to warrant employment termination; rather, it establishes employment termination was a consideration among appellant's supervisors during their deliberations as to what disciplinary action to render.

{¶18} This court has held that a plaintiff may establish pretext by demonstrating that an employer applied company policy differently in disciplining similarly-situated employees. *Wigglesworth* at ¶24. However, not only did appellant not assert similar-situated employees were treated differently, but Shasta set forth evidence via deposition testimony of Munroe and Tomanio that previous employees had been terminated for the unauthorized removal of company property.

{¶19} To the extent appellant's argument may be construed as one contending that Shasta's failure to subject him to progressive discipline implies that Shasta's motive for discharging him was age discrimination, this argument also fails. There is no evidence that required Shasta to use progressive discipline prior to termination of appellant's employment. *Wigglesworth* at ¶25 (where nothing requires an employer to use a progressive discipline policy, a failure to subject an employee to progressive discipline cannot establish pretext of age discrimination). Moreover, as explained supra, Shasta provided evidence that disciplinary action for a first time offense could indeed consist of employment termination.

{¶20} Appellant also complains that the investigation was flawed because appellant did not have an opportunity to tell his superiors that he had authorization to remove the oxygen unit. However, when asked at this deposition about such authorization, appellant stated the authorization was based on "past practices" in the plant, "implied things" in the plant, and "other incidents" that occurred in the plant. (Appellant's Deposition, 145.) When asked to explain further, and provide examples of the same, appellant gave only examples of Hale giving appellant express permission to take company property that was no longer in use, such as an unused safe and a previously-used computer hard-drive.

{¶21} Though appellant makes several blanket assertions that he established the articulated reason for his employment termination was merely a pretext for age discrimination, such blanket assertions are not enough to defeat appellees' motions for summary judgment. "[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real

reason." *Cozzuli v. Sandridge Food Corp.*, 9th Dist. No. 10CA0109-M, 2011-Ohio-4878, ¶15, quoting *Bennett v. Roadway Express, Inc.* (Aug. 1, 2001), 9th Dist. No. 20317, quoting *St. Mary's Honor Ctr. v. Hicks* (1993), 509 U.S. 502, 515, 113 S.Ct. 2742, 2752. This appellant fails to do.

{¶22} In sum, we conclude after a thorough review of the entire record that appellant has failed to discredit the legitimate, nondiscriminatory reason appellees offered for his employment termination. *Wigglesworth*. Without evidence of pretext, we conclude the trial court did not err in granting summary judgment on appellant's claim for age discrimination. Accordingly, appellant's first assignment of error is overruled.

{¶23} In his second assignment of error, appellant contends the trial court erred in granting summary judgment in favor of appellees on appellant's claim for breach of contract or, alternatively, for promissory estoppel.

{¶24} Pursuant to Ohio law, an employment relationship with no fixed duration is deemed to be at-will employment. *Hanly v. Riverside Methodist Hosps*. (1991), 78 Ohio App.3d 73, 77, citing *Henkel v. Educational Research Council* (1976), 45 Ohio St.2d 249. In an at-will employment relationship, the employer may discharge the employee at any time, even without cause, so long as the reason for the discharge is not contrary to law. *Taylor v. J.A.G. Black Gold Mgt. Co.*, 10th Dist. No. 09AP-209, 2009-Ohio-4848, ¶12, citing *Wright v. Honda of Am. Mfg., Inc.*, 73 Ohio St.3d 571, 574, 1995-Ohio-114. There are two exceptions to the employment-at-will doctrine: promissory estoppel and an express or implied contract altering the terms for discharge. *Fennessey v. Mt. Carmel Health Sys., Inc.*, 10th Dist. No. 08AP-983, 2009-Ohio-3750, ¶8, citing *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 103-04.

{¶25} An employee may recover under the theory of promissory estoppel if he proves that the employer made a promise that it should have reasonably expected the employee to rely upon, the employee relied upon the promise, and the employee suffered injury as a result of his reliance. *Taylor* at ¶14, citing *Kelly v. Georgia-Pacific Corp.* (1989), 46 Ohio St.3d 134, paragraph three of the syllabus; *Mers* at paragraph three of the syllabus. The promise at the heart of a promissory estoppel claim must consist of more than a commitment to the employee's future career development or a vague assurance of job security. *Hoyt v. Nationwide Mut. Ins. Co*., 10th Dist. No. 04AP-941, 2005-Ohio-6367, ¶45; *Buren v. Karrington Health, Inc*., 10th Dist. No. 00AP-1414, 2002-Ohio-206. Rather, in order to prove promissory estoppel, a promise of future benefits or opportunities must include a specific promise of continued employment. *Wing v. Anchor Media, Ltd*. (1991), 59 Ohio St.3d 108, paragraph two of the syllabus; *Fennessey* at ¶14; *Mazzitti v. Garden City Group, Inc*., 10th Dist. No. 06AP-850, 2007-Ohio-3285, ¶30; *Kirksey v. Automotive Cosmetics Corp*., 10th Dist. No. 03AP-239, 2004-Ohio-1060, ¶20.

{¶26} On appeal, appellant does not argue that an express contract governs this matter. Additionally, though referencing promissory estoppel in the stated assignment of error, appellant does not make any arguments to this court regarding promissory estoppel. Instead, appellant contends the facts of this case support his claim that his employment termination "was in violation of an implied contract of continuing employment." (Appellant's Brief, 41.)

{¶27} Whether explicit or implicit contractual terms have altered an at-will-employment agreement depends upon the history of the relations between the employer and employee, as well as the facts and circumstances surrounding the employment

relationship. Taylor at ¶18, citing *Wright* at 574. The relevant facts and circumstances include "the character of the employment, custom, the course of dealing between the parties, company policy, or any other fact which may illuminate the question * * *." *Mers* at paragraph two of the syllabus. See also *Kelly* at paragraph two of the syllabus. However, a plaintiff asserting the existence of an implied employment contact has a "heavy burden." *Wissler v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 09AP-569, 2010-Ohio-3432, ¶32, quoting *Walton v. Greater Cleveland Regional Transit Auth.* (June 29, 2000), 8th Dist. No. 76274, quoting *Srail v. RJF Internatl. Corp.* (1998), 126 Ohio App.3d 689, discretionary appeal not allowed, 82 Ohio St.3d 1473.

{¶28} To establish an implied contract, appellant asserts we must consider the character of the employment. According to appellant, "it can fairly be stated" that appellant was a successful and dedicated employee. This, however, does not change the nature of employment. Here, the character of the employment is clear from the employee handbook which contains specific and unambiguous disclaimers that nothing in the handbook is to be construed as altering the at-will nature of the employment relationship, and that the guidelines, policies, and procedures contained within "should not be construed to change the basic employment-at-will relationship between the company and each of its employees nor should they be construed to create a contract of employment between the company and any of its employees." Courts have held that where there exists at-will language in an employment application and manual, as well as disclaimer language disavowing statements to the contrary, there can be no inference of contractual obligations between the parties. *Fennessey* at ¶25, citing, e.g., *Mastromatteo v. Brown & Williamson Tobacco*, 2d Dist. No. 20216, 2004-Ohio-3776, ¶18, citing

Shepard v. Griffin Servs., Inc., 2d Dist. No. 19032, 2002-Ohio-2283, and *Napier v. Centerville City Schools*, 157 Ohio App.3d 503, 2004-Ohio-3089.

{¶29} Appellant next contends this court must consider the evidence in the record "in determining whether [appellant], in light of the time record and policy evidence, has a contractual claim to the funds he was, at Tomanio's own admission, entitled to." (Appellant's Brief, 41-42.) Not only does appellant fail to explain the meaning and significance of this statement, but, also, we note that appellant seemingly failed to assert such an argument in the trial court and has thus waived it for purposes of appeal. *Rhoades v. Chase Bank*, 2010-Ohio-6537, ¶24, citing *State ex rel. O'Brien v. Messina*, 10th Dist. No. 10AP-37, 2010-Ohio-4741, ¶17, citing *Porter Drywall, Inc. v. Nations Constr., LLC*, 10th Dist. No. 07AP-726, 2008-Ohio-1512, ¶11, citing *State v. Childs* (1968), 14 Ohio St.2d 56, paragraph three of the syllabus.

{¶30} For these reasons, we conclude there remained no issues of material fact on appellant's breach of contract claim and reasonable minds could only conclude that there existed no contract, express or implied, between appellant and Shasta. Therefore, the trial court properly granted summary judgment in favor of appellees on appellant's claim for breach of contract. Accordingly, appellant's second assignment of error is overruled.

{¶31} In his third assignment of error, appellant contends the trial court erred in granting appellees' motion for summary judgment on appellant's public policy claim. Though appellant's argument under this assigned error is limited, we glean from his brief that appellant is asserting that his employment termination was caused by his and his

wife's requests that Tomanio correct a problem they were having with United Healthcare Insurance Company ("UHC").

{¶32} During the summer of 2009, appellant's wife reported that she received checks from UHC under Medicare Part B for medical care that she had received. According to the record, though appellant's wife was enrolled in Medicare Part A, UHC was erroneously sending her checks for Medicare Part B services. Tomanio contacted UHC about the checks and ultimately UHC relayed to Tomanio that the issue had been resolved and that the erroneously-issued checks should be destroyed.

{¶33} In Ohio, the common-law doctrine of at-will employment governs employment relationships. The act of terminating an at-will employee's relationship with an employer usually does not give rise to an action for damages. *Dohme v. Eurand Am., Inc*., 130 Ohio St.3d 168, 2011-Ohio-4609, ¶11, citing *Collins v. Rizkana*, 73 Ohio St.3d 65, 67, 1995-Ohio-135; *Mers*. However, if an employee is discharged or disciplined 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 for wrongful discharge in violation of public policy may exist as an exception to the general rule. *Painter v. Graley*, 70 Ohio St.3d 377, 1994-Ohio-334, paragraph three of the syllabus; *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228, paragraph one of the syllabus.

{¶34} As stated in *Dohme*, the elements of a claim of wrongful discharge in violation of public policy are as follows:

> 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; internal quotations omitted.) Id. at ¶13-16.

{¶35} In an action claiming wrongful termination, the terminated employee must assert and prove a clear public policy deriving from the state or federal constitutions, a statute or administrative regulation, or the common law. *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, ¶16. See also *Painter* at 384. As recently recognized by *Dohme*, other states have similarly required that the clear public policy supporting the wrongful-discharge claim must be plainly manifested within a state or federal constitution, statute or administrative regulations or in the common law, and that the plaintiff must identify the specific expression of public policy. Id. at ¶18, citing *Turner v. Mem. Med. Ctr.* (2009), 233 Ill.2d 494, 502-03; *Gardner v. Loomis Armored, Inc.* (1996), 128 Wn.2d 931, 941, 913 P.2d 377; *Birthisel v. Tri-Cities Health Servs. Corp.* (1992), 188 W.Va. 371, 377.

{¶36} In *Dohme*, the plaintiff was fired from his employment with the defendant Eurand American, Inc., after two years of employment. The plaintiff argued he was fired for communicating his workplace safety concerns to an insurance adjuster who conducted an on-site evaluation of the defendant's facility. This communication underlied the plaintiff's claim of wrongful termination in violation of public policy. The Supreme

Court of Ohio concluded that once the defendant asserted no public policy applicable to the incident had been identified, the burden shifted to the plaintiff to articulate, by citation to its course, a specific clear public policy. To satisfy his burden, the plaintiff relied on the syllabus language of a former Supreme Court of Ohio decision regarding Ohio's public policy favoring workplace safety. The court found such citation to a case syllabus was insufficient to meet the burden of articulating a clear public policy of workplace safety, and that such citation only generally identified a legal basis for a statewide policy for workplace health and safety. "As the plaintiff, Dohme has the obligation to specify the sources of law that support the public policy he relies upon in his claim. Because Dohme did not back up his assertion of a public policy of workplace safety in his summary-judgment documents with specific sources of law, he has not articulated the clarity element of specificity." Id. at ¶22. Unless the plaintiff asserts a public policy and identifies federal or state constitutional provisions, statutes, regulations or common law that support the policy, a court may not presume to sua sponte identify the source of that policy. Id. at ¶23.

{¶37} Here, appellees argued that appellant's public policy claim clearly failed as a matter of law. Appellant, however, failed to meet his requisite burden to articulate, by citation to its source, a specific public policy that Shasta violated when it discharged him. In response to appellees' motions for summary judgment and on appeal, the only reference to a public policy appellant provides is "the government does not want employers making Medicare Part B payments to those that are not supposed to receive Medicare Part B." (Apr. 25, 2011 Memo Contra to Summary Judgment, 34; Appellant's Brief, 42.) This, however, is far from "articulating, by citation to its source, a specific clear

public policy" as is required to satisfy the specificity element of a claim of wrongful discharge in violation of public policy. *Dohme* at ¶19.

{¶38} Because appellant failed to establish that his discharge was 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, appellant's claim of wrongful discharge in violation of public policy fails for lack of proof of a specific clear public policy, and appellees were entitled to summary judgment in its favor on this claim. Accordingly, appellant's third assignment of error is overruled.

{¶39} In his fourth assignment of error, appellant contends the trial court erred in granting summary judgment in favor of appellees on appellant's claims for fraud or misrepresentation.

{¶40} In his amended complaint, appellant asserted appellees falsely represented to him that he "would be entitled to an investigation," that appellees "would use principles of fairness and dignity when dealing with compliance and discipline issues," and that appellees "would allow him an opportunity to explain his actions" before taking disciplinary action. Appellant contends that though he relied on these representations, appellees failed to act accordingly. (Amended Complaint, 10-11.)

{¶41} To prove fraud, a plaintiff must demonstrate: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation; and (6) a resulting injury proximately caused by the

reliance. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475, 1998-Ohio-294; *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 55.

{¶42} As set forth in *Behrend v. State* (1977), 55 Ohio App.2d 135, a false representation must relate to a present or past fact. Id. at 142. It is firmly established in Ohio that a misrepresentation, in order to be the basis for an action for fraud, must relate to a fact which either exists in the present or has existed in the past. *Block v. Block* (1956), 165 Ohio St. 365, 377; *Stone v. Wainwright* (1923), 19 Ohio App. 161; *Glass v. O'Toole* (1930), 36 Ohio App. 450; *J.B. Colt Co. v. Wasson* (1922), 15 Ohio App. 484. It is clear in Ohio that fraud cannot be predicated upon promises or representations relating to future actions or conduct. *Tibbs v. Natl. Homes Constr. Corp.* (1977), 52 Ohio App.2d 281. Representations as to what is to be performed or what will take place in the future are regarded as prediction and are generally not fraudulent. *J.B. Colt Co.* However, if it can be shown that a representation was untrue or was made with the intent to mislead, then fraud may be predicated thereon, notwithstanding the future nature of the representation. *Behrend.*

{¶43} Appellant has provided neither argument nor evidence to satisfy the elements required in a claim for fraud. Instead, appellant makes conclusory assertions. In *Dresher*, the Supreme Court of Ohio explicitly stated that when a court receives a properly presented motion for summary judgment, a nonmoving party may not rely upon the mere allegations of its complaint, but, instead, must demonstrate that a material issue of fact exists by directing the court's attention to evidentiary materials of the type listed in Civ.R. 56(C). Id. at 292. Appellant's brief fails to cite where in the record or what specific portions of the record support his assertion that genuine issues of material fact remain.

For example, in his appellate brief, appellant sets forth a single paragraph that, in most respects, is identical to that set forth in the trial court in his memorandum contra to appellees' motion for summary judgment. In this paragraph, appellant contends appellees made "fraudulent representations," disclosed "faulty facts and information with malicious intent," and made statements "riddled with inconsistencies, developed with malice, and are false." (Appellant's Brief, 42-43.) "These types of blanket statements add nothing to the analysis required by a court in addressing a motion for summary judgment. An appellate court is not required to comb through the record on appeal to search for error when appellants have failed to specify what factual issues allegedly remain for trial." *Tonti v. East Bank Condominiums, LLC*, 10th Dist. No. 07AP-388, 2007-Ohio-6779, ¶30, citing *Red Hotz, Inc. v. Liquor Control Comm.* (Aug. 17, 1993), 10th Dist. No. 93AP-87; App.R. 12(A).

{¶44} Accordingly, appellant's fourth assignment of error is not well-taken and is overruled.

{¶45} In his fifth assignment of error, appellant contends the trial court erred in granting appellees' motions for summary judgment on his claim for defamation. Specifically, appellant contends Hale, Inboden, and Tomanio made defamatory statements about him to members of Shasta's management.

{¶46} Defamation is a false statement published by a defendant acting with the required degree of fault that injures a person's reputation, exposes the person to public hatred, contempt, ridicule, shame or disgrace, or adversely affects the person's profession. *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7, 1995-Ohio-66. Generally speaking, defamation can come in

two forms: slander, which is spoken; and libel, which is written. See *Dale v. Ohio Civ. Serv. Emp. Assn.* (1991), 57 Ohio St.3d 112. The elements of a defamation action, whether slander or libel, are that: (1) the defendant made a false and defamatory statement concerning another; (2) that the false statement was published; (3) that the plaintiff was injured; and (4) that the defendant acted with the required degree of fault. *Celebrezze v. Dayton Newspapers, Inc.* (1988), 41 Ohio App.3d 343. The entry of summary judgment in a defendant's favor is appropriate in a defamation action if it appears, upon the uncontroverted facts of the record, that any one of the above critical elements of a defamation case cannot be established with convincing clarity. *Temethy v. Huntington Bancshares, Inc.*, 8th Dist. No. 83291, 2004-Ohio-1253.

{¶47} In their motion for summary judgment, appellees challenged appellant's ability to establish a prima facie case of defamation, but, also, asserted the defense of qualified privilege. "Generally, a communication made in good faith on a matter of common interest between an employer and an employee, or between two employees concerning a third employee, is protected by qualified privilege." *Hatton v. Interim Health Care of Columbus, Inc*., 10th Dist. No. 06AP-828, 2007-Ohio-1418, ¶14, quoting *Hanly* at 81. See also *Galyean v. Greenwell*, 4th Dist. No. 05CA11, 2007-Ohio-615, ¶68-69; *Kanjuka v. MetroHealth Med. Ctr.*, 151 Ohio App.3d 183, 2002-Ohio-6803, ¶42; *Blatnik v. Avery Dennison Corp.*, 148 Ohio App.3d 494, 2002-Ohio-1682, ¶57. This rule of law arises from *Evely v. Carlon Co.* (1983), 4 Ohio St.3d 163, 165-66, in which the Supreme Court of Ohio afforded a qualified privilege to allegedly defamatory statements that corporate officers made to other officers and supervisory personnel about an employee's on-the-job activities.

{¶48} Once the defense of qualified privilege attaches, a plaintiff can only defeat the privilege with clear and convincing evidence that the defendant made the statements at issue with actual malice. *A & B-Abell Elevator Co.* at 11, citing *Jacobs v. Frank* (1991), 60 Ohio St.3d 111, paragraph two of the syllabus. A defendant acts with "actual malice" if she makes statements with the knowledge that her statements are false or if she recklessly disregards the truth or falsity of her statements. *Hatton* at ¶15, citing *A & B-Abell Elevator Co.* at 11-12.

{¶49} In the case sub judice, appellant asserts the following facts demonstrate defamation: (1) Inboden acknowledged at his deposition that though he did the best he could to ensure accuracy, some of his statements may have been inaccurate; (2) Hale informed members of Shasta management that he learned of appellant's taking the oxygen unit on January 11, 2010, but Inboden testified that Hale requested information about the event on January 4, 2010; and (3) Inboden testified that a certain document was kept in his office, but Hale testified that he retrieved that document from a "filing cabinet in the front office." (Hale Deposition, 138.)

{¶50} We need not decide whether these statements can qualify as ones of a defamatory nature because the record reflects the challenged statements are protected by qualified privilege. Appellant does not dispute, and in fact he concedes under this assignment of error, that the challenged communications were made between employees having a common interest with regard to appellant's work performance. Thus, appellees possessed a qualified privilege to make the alleged statements.

{¶51} Appellant contends we should revoke that qualified privilege because "[t]he mere fact that these individuals made these statements and corporate acted upon them is

sufficient to establish a genuine issue of material fact as to whether the Defendants acted with malice." (Appellant's Brief, 44.) Aside from this conclusory assertion, appellant provides no evidence to establish that Hale and Inboden "knew that their statements were false nor that they were aware of a high probability of the statements' falsity." *Hatton* at ¶17. There is no evidence that Hale and Inboden knowingly mischaracterized appellant's actions or their honest judgment of those actions when they discussed the events surrounding the removal of the oxygen unit. As appellant failed to present any evidence suggesting that appellees acted with actual malice, we conclude that they are entitled to a qualified privilege. Accordingly, appellant's fifth assignment of error is overruled.

{¶52} For the foregoing reasons, we overrule appellant's five assignments of error, and hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and CONNOR, J., concur.

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