[Cite as *Pohmer v. JPMorgan Chase Bank, N.A.*, 2015-Ohio-1229.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kevin P. Pohmer,	:	
Plaintiff-Appellant,	:	No. 14AP-429 (C.P.C. No. 12CV-14512)
v.	:	(REGULAR CALENDAR)
JPMorgan Chase Bank, N.A.,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 31, 2015

Law Offices of Russell A. Kelm, *Russell A. Kelm*, and *Joanne W. Detrick*, for appellant.

Ice Miller LLP, *James E. Davidson*, and *J. David Campbell*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Plaintiff-appellant, Kevin P. Pohmer, appeals from a judgment entry of the Franklin County Court of Common Pleas granting the motions for summary judgment of defendant-appellee, JPMorgan Chase Bank, N.A. ("JPMC"). For the following reasons, we affirm in part and reverse in part.

I. Facts and Procedural History

{¶ 2} Pohmer began his employment relationship with JPMC in 1998 in New York. In 2005, Pohmer moved to the Columbus area to handle pension and retirement funds for JPMC. Beginning in early 2009, Pohmer worked as an executive director within JPMC's Worldwide Security Services ("WSS") business unit, servicing domestic and

multi-national clients with assets ranging from hundreds of millions of dollars to over a billion dollars. Pohmer held that position until his termination on January 13, 2012.

{¶ 3} JPMC paid Pohmer with both a base salary and an annual bonus. During his last year with JPMC, Pohmer's annual base salary was $200,000. Pohmer has received bonuses throughout his 13 years of employment with JPMC. Since January 1, 2006, JPMC has had an incentive-based bonus plan called the Performance Based Incentive Compensation Plan ("PBIC Plan"), purporting to govern those JPMC employees that are eligible for bonuses and in what amounts. In the years following JPMC's adoption of the PBIC Plan, Pohmer had received annual bonuses ranging from $45,000 up to $210,500. When JPMC terminated Pohmer's employment on January 13, 2012, JPMC did not pay him an annual bonus for his work during the 2011 calendar year as JPMC had not yet approved and distributed bonuses for the 2011 work year at the date of his termination.

{¶ 4} The PBIC Plan is an eight-page document that is not signed by anyone on behalf of JPMC nor is it countersigned by employees potentially eligible to receive bonuses under the PBIC Plan. The language of the PBIC Plan repeatedly makes the payment of bonuses discretionary, giving JPMC the sole discretion to fund bonuses. For example, Section 4.1 of the PBIC Plan, "Establishment of Incentive Funding," states the funding of the annual performance-based incentive compensation is "discretionary, subject to the determination of the * * * Board of Directors" of JPMC. (Stipulated Facts, Exhibit A.) Section 4.2, "Participation in the Plan," further states "[t]he amount and the form of any Award shall be determined in the sole and absolute discretion of [JPMC]." (Stipulated Facts, Exhibit A.) Additionally, Section 4.3, "Individual Performance Criteria," reiterates that "[t]he determination of the applicable criteria and whether the Eligible Employee has satisfied such performance-based criteria sufficiently to be entitled to an Award shall also be in the sole discretion of [JPMC]." (Stipulated Facts, Exhibit A.)

{¶ 5} In addition to the repeated references to the discretionary nature of the bonuses, the PBIC Plan also imposes a requirement that an employee still be employed by JPMC on the date that bonuses are paid in order to be eligible for his or her bonus. Section 4.2 of the PBIC Plan, titled "Participation in the Plan," includes the statement that "an Award is only made to the Eligible Employee under this Plan if he/she is employed on

the Payment Date specified by" JPMC. (Stipulated Facts, Exhibit A.) Section 5.2, "Payment of Awards," then reiterates that "no Award shall be made to an Eligible Employee unless employed on the Payment Date," and specifies that "an Eligible Employee has no interest in an Award until paid." (Stipulated Facts, Exhibit A.)

{¶ 6} Pohmer never signed a copy of the PBIC Plan and asserts he "never saw a copy of [the PBIC Plan] while [he] was an employee" of JPMC. (Jan. 17, 2014 Pohmer Affidavit, ¶ 10.) He did, however, view a PowerPoint presentation in June 2011 entitled "WSS Client Management and Sales-Prospector and Relationship Manager Scorecard" ("Scorecard"). The Scorecard does not mention the requirement of continued employment on the payment date in order to be eligible for the bonus. Instead, the Scorecard addresses other factors used to arrive at potential bonus amounts such as sales planning, increasing revenue generation, and stealing business from competitors. The Scorecard states that "[o]verall payout will range from 2.5 – 4.5 % of closed new business for the year." (Stipulated Facts, Exhibit B.)

{¶ 7} In an October 3, 2011 email, Pohmer's supervisor, Sekou Kaalund, stated Pohmer's bonus for the 2011 calendar year would be 4.5 percent of closed new business. The last time JPMC conducted a performance review for Pohmer was December 27, 2011 in which Pohmer received the top rating of "exceeds expectations." (Jan. 17, 2014 Pohmer Affidavit, ¶ 7.) The performance review further noted Pohmer was "forecasted to close $5.5 [million] against a plan of $4.0 [million]," and that Pohmer "grew his pipeline to over $50 [million] and has the largest pipeline on the team." (Jan. 17, 2014 Pohmer Affidavit, ¶ 7.)

{¶ 8} Pohmer averred in an affidavit that throughout 2011, he "was very vocal about [his] view that the ECR campaign was illegal and a scam." (Feb. 18, 2014 Pohmer Affidavit, ¶ 6.) ECR is not clearly defined in the record, but Pohmer consistently uses the acronym to refer to a new product offered by JPMC. Pohmer stated he complained to Kaalund about the ECR campaign and "followed up with emails, instant messages ([S]ametime), [and] verbally." (Feb. 18, 2014 Pohmer Affidavit, ¶ 6.) However, none of these alleged emails or Sametime messages appear in the record and Kaalund denies that Pohmer ever complained to him about the legality of the ECR campaign.

{¶ 9} JPMC has a Code of Conduct for its employees. The Code of Conduct contains a section addressing appropriate use of company telephones, email, Internet, and other electronic communications. In relevant part, the Code of Conduct states:

> Telephones, electronic mail (e-mail) systems and other electronic communications devices provided by [JPMC], whether in the workplace or elsewhere, are the property of the firm and should be used for business purposes; however, reasonable personal use is permitted, consistent with the Code and all other policies of the firm. You are expected to use common sense and good judgment in determining what is and what is not "reasonable personal use."

(Pohmer Deposition, Exhibit 7 at 10.) Violations of the policies contained in the Code of Conduct "may result in corrective action, up to and including immediate termination of employment." (Pohmer Deposition, Exhibit 7 at 2.) JPMC asked its employees to read, understand, and affirm their compliance with the Code of Conduct on an annual basis, which Pohmer did for each year of his employment with JPMC.

{¶ 10} During a random internal review of all communications sent over JPMC servers, JPMC discovered that Pohmer had been using his company BlackBerry and email account to engage in inappropriate, sexual communications. Specifically, JPMC produced hundreds of pages of emails and Sametime messages (JPMC's internal instant messaging system), showing that Pohmer had used his company property to make sexual advances toward his children's babysitter and to exchange flirtatious and sexual messages with other employees of JPMC. Some of the electronic communications suggested Pohmer was engaging in sexual activity on JPMC premises, and other electronic communications included attachments of sexually suggestive photographs. Pohmer does not dispute that he used his corporate property and email account for these communications.

{¶ 11} JPMC terminated Pohmer's employment on January 13, 2012 based on Pohmer's "inappropriate" use of company-issued devices and systems. (Stipulated Facts, ¶ 1.) Four days later, on January 17, 2012, the JPMC Board of Directors approved incentive compensation bonuses for the 2011 calendar year, and JPMC then paid out the money for those bonuses on January 24, 2012. According to Pohmer's calculations based on the revenue he generated for JPMC in 2011 and using the 4.5 percent structure from the Scorecard, he should have received a bonus of $247,500 for the 2011 calendar year.

Pohmer further calculated that, based on deferred revenue for 2012, he was entitled to an additional $587,250 bonus for the 2012 calendar year.

{¶ 12} On November 21, 2012, Pohmer filed a complaint against JPMC alleging JPMC terminated him in retaliation for blowing the whistle on perceived illegal activity and to avoid paying him his bonus. In his complaint, Pohmer asserted claims for quantum meruit, unjust enrichment, violation of Ohio's whistleblower protection statute, and reverse race discrimination. In its answer filed January 23, 2013, JPMC asserted it terminated Pohmer for a code of conduct violation involving inappropriate use of company email, and not in retaliation for blowing the whistle or as an act of reverse race discrimination. Further, JPMC asserted it did not owe Pohmer a bonus for the 2011 calendar year because Pohmer was not employed by JPMC on the date bonuses were approved and paid as required by the PBIC Plan.

{¶ 13} JPMC filed two motions for summary judgment: one on January 3, 2014 as to Pohmer's claims for quantum meruit and unjust enrichment and one on January 31, 2014 as to Pohmer's whistleblower and reverse race discrimination claims. Pohmer responded with a memorandum in opposition to each motion for summary judgment. On March 4, 2014, Pohmer filed a motion to compel additional discovery. The trial court granted in part and denied in part Pohmer's motion to compel in an April 2, 2014 journal entry.

{¶ 14} In an April 9, 2014 journal entry, the trial court granted JPMC's motion for partial summary judgment on Pohmer's claims for quantum meruit and unjust enrichment. Pohmer responded with an April 25, 2014 motion for reconsideration of the trial court's decision granting partial summary judgment. Separately, in an April 28, 2014 journal entry, the trial court granted JPMC's motion for summary judgment with respect to the whistleblower and reverse race discrimination claims and denied Pohmer's motion for reconsideration on the bonus claims. Also on April 28, 2014, the trial court issued a final judgment dismissing all claims against JPMC based on its granting of JPMC's two motions for summary judgment. Pohmer timely appeals.

II. Assignments of Error

{¶ 15} Pohmer assigns the following errors for our review:

> [1.] The trial court erred in granting summary judgment on [Pohmer's] claims for quantum meruit and unjust enrichment.
>
> [2.] The trial court erred in granting summary judgment on [Pohmer's] reverse race discrimination claim.
>
> [3.] The trial court erred in denying in part [Pohmer's] motion to compel certain discovery.
>
> [4.] The trial court erred in granting summary judgment on [Pohmer's] whistleblower claim.

III. Standard of Review and Applicable Law

{¶ 16} An appellate court reviews summary judgment under a de novo standard. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41 (9th Dist.1995); *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994). Summary judgment is appropriate only when the moving party 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, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183 (1997).

{¶ 17} Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). However, the moving party cannot discharge its initial burden under this rule with a conclusory assertion that the nonmoving party has no evidence to prove its case; the moving party must specifically point to evidence of the type listed in Civ.R. 56(C) affirmatively demonstrating that the nonmoving party has no evidence to support the nonmoving party's claims. *Id.*; *Vahila v. Hall*, 77 Ohio St.3d 421, 429 (1997). Once the moving party discharges its initial burden, summary judgment is appropriate if the nonmoving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. *Dresher* at 293; *Vahila* at 430; Civ.R. 56(E).

IV. First Assignment of Error – Quantum Meruit and Unjust Enrichment

{¶ 18} In his first assignment of error, Pohmer argues the trial court erred in granting summary judgment to JPMC on Pohmer's claims of quantum meruit and unjust enrichment, the two claims asserting JPMC wrongfully withheld payment of Pohmer's bonus when it terminated him.

{¶ 19} "The doctrine of unjust enrichment 'applies when a benefit is conferred and it would be inequitable to permit the benefitting party to retain the benefit without compensating the conferring party.' " *Garb-Ko, Inc. v. Benderson*, 10th Dist. No. 12AP-430, 2013-Ohio-1249, ¶ 25, quoting *Meyer v. Chieffo*, 193 Ohio App.3d 51, 2011-Ohio-1670, ¶ 16 (10th Dist.). The elements of an unjust enrichment claim are: (1) the plaintiff conferred a benefit on the defendant, (2) the defendant knew of the benefit, and (3) it would be unjust to allow the defendant to retain the benefit without payment to the plaintiff. *Id*., citing *Meyer* at ¶ 37, citing *Maghie & Savage, Inc. v. P.J. Dick Inc.*, 10th Dist. No. 08AP-487, 2009-Ohio-2164, ¶ 33.

{¶ 20} A claim for quantum meruit shares the same essential elements as a claim for unjust enrichment, and both doctrines are equitable doctrines. *Garb-Ko* at ¶ 26, citing *Meyer* at ¶ 37, citing *Maghie* at ¶ 33. The two doctrines differ, however, when calculating damages. The damages for unjust enrichment are " ' "the amount the defendant benefited," ' " while the damages for quantum meruit are " ' "the measure of the value of the plaintiff's services, less any damage suffered by the other party." ' " *Id*., quoting *Meyer* at ¶ 37, quoting *U.S. Health Practices, Inc. v. Byron Blake, M.D., Inc.*, 10th Dist. No. 00AP-1002 (Mar. 22, 2001).

{¶ 21} Because unjust enrichment and quantum meruit are equitable remedies, these doctrines do not apply when a contract exists between the parties covering the same subject. *Corbin v. Dailey*, 10th Dist. No. 08AP-802, 2009-Ohio-881, ¶ 10, citing *Hummel v. Hummel*, 133 Ohio St. 520, 525-28 (1938). The trial court concluded that an implied-in-fact contract existed between the parties based on the PBIC Plan. Because the PBIC Plan directs that bonuses are discretionary and requires an employee still be employed on the date any bonus money is distributed in order to receive a bonus, the trial court determined that Pohmer's claims for unjust enrichment and quantum meruit failed as a

matter of law. In so deciding, the trial court determined that it must apply New York law to this dispute as was specified in the PBIC Plan.

{¶ 22} Section 14 of the PBIC Plan is a choice-of-law provision stating "[t]he validity, construction and effect of the Awards, the Plan and any rules and regulations relating to the Plan shall be determined in accordance with the laws of the State of New York, without regard to conflicts of laws principles." (Stipulated Facts, Exhibit A.) Pohmer initially argues the trial court erred in applying New York law. Before we reach the issue of whether Ohio or New York law applies, we must first, as a threshold matter, determine whether the PBIC Plan constituted an enforceable contract between the parties. If the PBIC Plan is not an enforceable contract, we need not adhere to its choice-of-law clause.

{¶ 23} JPMC asserts the PBIC Plan is a valid, enforceable contract that operates to preclude Pohmer's equitable claims of unjust enrichment and quantum meruit. Pohmer responds that the PBIC Plan is an illusory contract and, thus, not enforceable. "A contract is illusory only when by its terms the promisor retains an unlimited right to determine the nature or extent of his performance; the unlimited right, in effect, destroys his promise and thus makes it merely illusory." *Imbrogno v. Mimrx.com, Inc.*, 10th Dist. No. 03AP-345, 2003-Ohio-6108, ¶ 8, citing *Century 21 Am. Landmark, Inc. v. McIntyre*, 68 Ohio App.2d 126 (1st Dist.1980), syllabus. If a promise is illusory, then the contract is not enforceable. *Id.*, citing *Century 21*.

{¶ 24} The plain language of the PBIC Plan, as we explained above in our discussion of the underlying facts, is explicit that the decision of whether to award bonuses and in what amount rests entirely in the discretion of JPMC. Additionally, JPMC does not dispute that the plain language of the PBIC Plan gives JPMC unfettered discretion in whether to award a bonus and in what amount, stating in its brief that the PBIC Plan "provides JPMC with complete discretion relative to whether and in what amount to make any award." (JPMC Brief, 34.) Thus, we agree with Pohmer that the PBIC Plan, in this specific case, amounts to an illusory contract. *See Imbrogno* at ¶ 9-11 (finding a written contract for stock options to be an illusory contract where the terms of the agreement gave the employer "an unlimited right to determine the nature and extent of performance," and gave the employer the right to decide to award no stock options in

exchange for the employee's performance); *Quesnell v. Bank One Corp.*, 10th Dist. No. 01AP-792 (Apr. 4, 2002) (finding an incentive compensation plan to be an illusory promise where the plan provides that the employer bank may modify, amend, or terminate the plan at any time, and further provides that "[t]he existence of the Plan does not obligate the [employer] to pay an award to any participant * * * nor does the participant * * * attain any vested right to forfeit an award until the award has been finalized and approved for payment").

{¶ 25} In deciding that the PBIC Plan is an illusory contract with respect to Pohmer, we do not mean to say that the PBIC Plan would be illusory under all circumstances. This is not a case where Pohmer was made aware of the terms of the PBIC Plan and thereby assented to the PBIC's terms in exchange for his continued employment with JPMC. *See Metz v. Am. Elec. Power Co., Inc.*, 172 Ohio App.3d 800, 2007-Ohio-3520, ¶ 73-74 (10th Dist.) (Bryant, J., plurality opinion expressing the opinion of the court on this issue) (concluding that an incentive compensation plan that gave discretion to the employer as to whether to award a bonus and in what amount was an enforceable contract with respect to two at-will employees "by virtue of the unilateral contract that existed between the parties when [the at-will employees], understanding the terms of the [incentive compensation plan] offer, continued their work at [the company]"). Here, JPMC did not require Pohmer to specifically assent to the terms of the PBIC Plan in exchange for his continued employment, and Pohmer averred he was unaware the PBIC Plan even existed during his employment with JPMC. Contrary to JPMC's argument, Pohmer stipulated to the authenticity and admissibility of the PBIC Plan document but did not indicate that he had reviewed or been made aware of the document's existence while he was an employee at JPMC. Therefore, under these facts as they apply specifically to Pohmer, we find the PBIC Plan to be an illusory contract and, thus, we need not adhere to the PBIC Plan's New York choice-of-law clause.

{¶ 26} Having determined the PBIC Plan is an illusory contract, we find the trial court erred in concluding the PBIC Plan operates to bar Pohmer's equitable claims for unjust enrichment and quantum meruit. In the absence of an enforceable contract on the issue of bonus compensation, there remain genuine issues of material fact as to whether Pohmer is entitled to a bonus and in what amount under the theories of unjust

enrichment and quantum meruit. Because the trial court erred in granting JPMC's motion for summary judgment on these claims, we sustain Pohmer's first assignment of error.

V. Second Assignment of Error – Reverse Race Discrimination

{¶ 27} In his second assignment of error, Pohmer argues the trial court erred in granting JPMC's motion for summary judgment with respect to his claim for reverse race discrimination.

{¶ 28} Pohmer's complaint asserts a claim for reverse race discrimination based on R.C. Chapter 4112. R.C. 4112.02(A) states:

> It shall be an unlawful discriminatory practice * * * [f]or any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry 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.

Additionally, R.C. 4112.99 authorizes civil actions for relief for violations of R.C. Chapter 4112. Ohio courts look to the guidance of federal case law interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., to examine state employment discrimination claims. *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, ¶ 15. Title VII jurisprudence places the burden on the plaintiff to establish discrimination.

{¶ 29} To prevail in an employment discrimination case, the plaintiff must prove discriminatory intent by either direct or indirect evidence. *Dalton v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 13AP-827, 2014-Ohio-2658, ¶ 26, citing *Gismondi v. M & T Mtge. Corp.*, 10th Dist. No. 98AP-584 (Apr. 13, 1999). " '[A] plaintiff may establish a prima facie case of * * * discrimination directly by presenting evidence, of any nature, to show that an employer more likely than not was motivated by discriminatory intent.' " *Refaei v. Ohio State Univ. Hosp.*, 10th Dist. No. 10AP-1193, 2011-Ohio-6727, ¶ 12, quoting *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578 (1996), paragraph one of the syllabus. "Alternatively, a plaintiff may establish a prima facie case of discrimination indirectly through the first part of the [*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)] three-part, burden-shifting approach, to create an inference of discriminatory intent." *Id.*, citing *Mauzy*;

Bucher v. Sibcy Cline, Inc., 137 Ohio App.3d 230, 239 (1st Dist.2000), citing *McDonnell Douglas* at 802. Under the latter approach, a plaintiff must demonstrate by a preponderance of the evidence that (1) he was a member of a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) comparable, non-protected persons received more favorable treatment. *Refaei* at ¶ 12, citing *Saha v. The Ohio State Univ.*, 10th Dist. No. 10AP-1139, 2011-Ohio-3824, ¶ 47, citing *Clark v. Dublin*, 10th Dist. No. 01AP-458 (Mar. 28, 2002).

{¶ 30} Once a plaintiff establishes a prima facie case of discrimination, a rebuttable presumption shifts the burden to the defendant to "articulate clearly a legitimate, nondiscriminatory reason for the adverse action" to support a finding that "unlawful discrimination was not the cause of the challenged employment action." *Refaei* at ¶ 13, citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510 (1993). The burden on JPMC here is one of production, as a "defendant need not prove a nondiscriminatory reason" for the adverse employment action, "but need merely articulate a valid rationale." *Id.*, citing *Williams v. Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268, ¶ 14.

{¶ 31} If the employer carries its burden, the burden shifts back to the plaintiff to demonstrate that the reason the employer articulated for taking the adverse employment action is mere pretext for discrimination. *Refaei* at ¶ 14, citing *Boyd v. Ohio Dept. of Mental Health*, 10th Dist. No. 10AP-906, 2011-Ohio-3596, ¶ 28, citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

{¶ 32} In claims of reverse discrimination, the plaintiff bears the burden of demonstrating that his or her employer intentionally discriminated against him or her despite his or her majority status, and courts have altered the elements of the prima facie case of discrimination to reflect the unique nature of the claim. *Mowery v. Columbus*, 10th Dist. No. 05AP-266, 2006-Ohio-1153, ¶ 44, citing *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir.1985). Therefore, in order to establish a prima facie case of reverse race discrimination, Pohmer must show (1) background circumstances supporting the inference that JPMC was the unusual employer who discriminated against non-minority employees, (2) that JPMC took an action adverse to Pohmer's employment, (3) that Pohmer was qualified for the position, and (4) that JPMC treated Pohmer disparately from similarly situated minority employees. *Id.*, citing *Courie v. ALCOA*, 162

Ohio App.3d 133, 2005-Ohio-3483, ¶ 20 (8th Dist.), citing *Grooms v. Supporting Council of Preventative Effort*, 157 Ohio App.3d 55, 2004-Ohio-2034, ¶ 20 (2d Dist.).

{¶ 33} The evidence is undisputed that JPMC terminated Pohmer's employment following an internal review that revealed Pohmer was using company email for inappropriate personal reasons in violation of JPMC's Code of Conduct. Though Pohmer does not contest that his conduct on the company's email came up during a random review, he nonetheless asserts his termination amounted to reverse race discrimination because minority employees of JPMC engaged in the same conduct but were not terminated.

{¶ 34} JPMC first argues that Pohmer's reverse race discrimination claim fails because Pohmer failed to establish that JPMC is the unusual employer who discriminated against non-minority employees. We agree. Though Pohmer asserted in his memorandum in opposition to summary judgment that "JPMC is the unusual employer that favors the minority over the majority," Pohmer did not point to any Civ.R. 56 evidence to support this claim. (Feb. 18, 2014 Memorandum in Opposition, 8.) Pohmer also notes that other courts have expressed "serious misgivings" about the portion of the reverse race discrimination test requiring a plaintiff to show background circumstances and suggests this court need not require a reverse race discrimination plaintiff to make such a showing. *See Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 (6th Cir.1994); *Petro v. Cuyahoga Cty. Bd. of Commrs.*, 8th Dist. No. 81358, 2003-Ohio-2188, ¶ 15. However, this court has adopted the "heightened" standard for reverse race discrimination. *Mowery* at ¶ 44; *Lang v. Columbus Div. of Power & Water*, 10th Dist. No. 11AP-968, 2012-Ohio-2037, ¶ 38; *Bogdas v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-466, 2009-Ohio-6327, ¶ 32. Moreover, while expressing misgivings, both the Sixth Circuit and the Eighth District nonetheless adopted the heightened standard, particularly because in each of those cases the plaintiffs' claims failed for their inabilities to carry their burdens on one or more of the remaining prongs of the test.

{¶ 35} Even setting aside Pohmer's inability to demonstrate that JPMC is the unusual employer that favors the minority over the majority, Pohmer's reverse race discrimination claim fails because Pohmer has not identified a similarly situated minority employee who was treated more favorably than Pohmer. "To make a comparison between

the plaintiff's treatment and the treatment of non-protected employees, 'the plaintiff must show that the "comparables" are similarly-situated *in all respects*.' " (Emphasis sic.) *Tilley v. Dublin*, 10th Dist. No. 12AP-998, 2013-Ohio-4930, ¶ 34, quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir.1992). The Sixth Circuit later clarified that the plaintiff must prove that " 'all of the *relevant* aspects of his employment situation were "nearly identical" to those of the [comparable employee's] employment situation.' " (Emphasis sic.) *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir.1998), quoting *Pierce* at 802. Thus, to be deemed "similarly situated," "the comparables 'must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.' " *Tilley* at ¶ 34, quoting *Mitchell* at 583.

{¶ 36} Pohmer argues Kaalund, his supervisor at JPMC, is a similarly situated minority employee who received more favorable treatment than Pohmer. On August 20, 2013, Kaalund received a written warning from JPMC for his own inappropriate use of the corporate email system, more specifically for exchanging inappropriate emails with an employee whom Kaalund directly managed. According to Pohmer, his termination reflects disparate treatment from Kaalund's less severe sanction of a written warning for the same code of conduct violation.

{¶ 37} Though Pohmer asserts Kaalund is a similarly situated employee, we disagree. First, by Pohmer's own admission, Kaalund was his direct supervisor while at JPMC, not a fellow employee holding an equal position. "In practical terms, two employees are not similarly situated in all relevant respects if there is a meaningful distinction between them that explains their employer's different treatment of them," and a supervisor's "position of authority within the company create[s] a meaningful distinction" that "explains [the employer's] different treatment of the two." *Koski v. Willowwood Care Ctr. of Brunswick, Inc.*, 158 Ohio App.3d 248, 2004-Ohio-2668, ¶ 17-18 (9th Dist.).

{¶ 38} While the fact that Kaalund was a supervisor is enough to conclude the two were not similarly situated employees, other mitigating circumstances also support this conclusion. Importantly, Pohmer's misuse of the company email system was discovered

during a random internal review in January 2012. By contrast, it was Pohmer, after his termination, who alerted JPMC to Kaalund's possible misuse of the company email, and JPMC did not address Kaalund's violations of the code of conduct until summer 2013. The disparity in time is important because the two violations were evaluated on individual bases, considering the unique factual circumstances relative to each Pohmer and Kaalund and their respective positions within the company. Other factors may have been at play including a discrepancy in the volume, frequency, and level of inappropriateness contained in the emails of each of the two men. JPMC did not discover the emails of Pohmer and Kaalund at the same time and in the same manner and choose to arbitrarily enforce the same policy in two differing ways. In short, Pohmer is unable to establish that Kaalund is a similarly situated employee.

{¶ 39} Additionally, even when a plaintiff is able to establish a prima facie case of reverse race discrimination, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse action. Here, JPMC explained it terminated Pohmer's employment based on Pohmer's violation of the Code of Conduct. Violation of a company policy is a legitimate, nondiscriminatory rationale for terminating an employee. *Morrissette v. DFS Servs., L.L.C.*, 10th Dist. No. 12AP-611, 2013-Ohio-4336, ¶ 36.

{¶ 40} Because JPMC successfully articulated a legitimate, nondiscriminatory reason for terminating Pohmer, the burden then shifts back to Pohmer to prove JPMC's stated reasons " 'were not its true reasons, but merely a pretext for unlawful discrimination.' " *Id*. at ¶ 31, quoting *Dautartas v. Abbott Laboratories*, 10th Dist. No. 11AP-706, 2012-Ohio-1709, ¶ 27. In order to establish that the reason is merely a pretext, " 'the plaintiff must demonstrate that the proffered reason "(1) has no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was insufficient to warrant the challenged conduct." ' " *Id*., quoting *Abbott Laboratories* at ¶ 28, quoting *Knepper v. The Ohio State Univ*., 10th Dist. No. 10AP-1155, 2011-Ohio-6054, ¶ 12.

{¶ 41} Here, Pohmer is unable to demonstrate that there remains a genuine issue of material fact as to whether JPMC's articulated reason for terminating him was mere pretext. First, Pohmer does not demonstrate that the articulated reason has no basis in fact, as Pohmer's own deposition testimony admits that he forwarded and received

inappropriate communications over company systems and that he knew the Code of Conduct limited him to reasonable personal use of JPMC devices and systems. As the Code of Conduct explicitly states the consequences for violations of the policies contained therein can lead to termination, Pohmer also is unable to demonstrate his conduct was insufficient to warrant his termination. Finally, although Pohmer insists that his termination must have been motivated by something other than his Code of Conduct violation, i.e., his allegation that JPMC treated Kaalund more favorably for a similar violation, there is no evidence in the record to support that assertion. Pohmer points to no Civ.R. 56 evidence suggesting anyone at JPMC knew of any improper conduct by Kaalund at the time it discovered Pohmer's improper conduct. Thus, based on the evidence in the record, reasonable minds could only conclude that Pohmer failed to demonstrate JPMC's reason for terminating him was mere pretext. *Paranthaman v. State Auto Property & Cas. Ins. Co.*, 10th Dist. No. 14AP-221, 2014-Ohio-4948, ¶ 42.

{¶ 42} In summation, Pohmer is unable to establish that JPMC is the unusual employer that discriminated against non-minority employees, that there existed a similarly situated minority employee who received more favorable treatment than Pohmer, or that JPMC's articulated reason for terminating Pohmer was mere pretext. For these many reasons, Pohmer's reverse race discrimination claim fails, and the trial court did not err in granting summary judgment to JPMC on this claim. We overrule Pohmer's second assignment of error.

VI. Third Assignment of Error – Motion to Compel

{¶ 43} In his third assignment of error, Pohmer asserts the trial court erred when it denied in part his motion to compel.

{¶ 44} On March 4, 2014, Pohmer filed a motion to compel discovery, seeking the following additional discovery: (1) the deposition of John L. Donnelly, the head of human Resources for JPMC; (2) the deposition of Michael Cavanaugh, the CEO of treasury and securities services business line of JPMC; (3) both his own email box and Sametime messages for the year 2011 and those of Kaalund; (4) a forensic technology analysis to ensure documents have not been deleted or destroyed from email boxes or Sametime messages; and (5) the complete human resources files of Kaalund and Mark Settles (a minority employee).

{¶ 45} The trial court conditionally denied Pohmer's request to take the deposition of Cavanaugh and for a forensic analysis of the email boxes and Sametime messages on the conditions that JPMC not call Cavanaugh as a witness at trial and not introduce any forensic examination of email boxes or Sametime messages for 2011. The trial court also denied the forensic review as unlikely to lead to admissible evidence and disproportionately costly. Additionally, the trial court denied in part Pohmer's request for Settles' complete human resources file but ordered JPMC to produce any references in the file that directly or indirectly references a possible violation of JPMC policies. The trial court granted Pohmer's request for Kaalund's complete human resources file for the years 2010 and 2011 and granted Pohmer's request to take the deposition of Donnelly. Finally, the trial court granted Pohmer's request for the production of Sametime messages unless those messages had already been produced by JPMC, in which case the trial court ordered JPMC to so certify in writing.

{¶ 46} An appellate court reviews a trial court's resolution of discovery matters under an abuse of discretion standard. *Jacobs v. Jones*, 10th Dist. No. 10AP-930, 2011-Ohio-3313, ¶ 55, citing *State ex rel. Keller v. Columbus*, 164 Ohio App.3d 648, 2005-Ohio-6500, ¶ 39 (10th Dist.), citing *State ex rel. The V. Cos. v. Marshall*, 81 Ohio St.3d 467, 469 (1998). An abuse of discretion implies the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 47} On appeal, Pohmer argues the trial court abused its discretion when it denied his request to conduct a forensic analysis of the email and Sametime systems. Pohmer asserts that JPMC had already withheld emails and Sametime messages earlier in the discovery process, though Pohmer has no evidence to suggest any withholding was deliberate or that any emails or messages were intentionally destroyed. Following a review of more than 15,000 emails and their attachments, JPMC produced 3,773 responsive documents to comply with the September 30, 2013 electronic discovery order. JPMC did not locate any emails using the date and term restrictions provided in the September 30, 2013 electronic discovery order, but, at the request of Pohmer's counsel, broadened the scope of the review to include emails sent by Pohmer. Using the new search terms, JPMC produced three additional emails responsive to the new search

parameters. JPMC then confirmed it had no additional documents responsive to Pohmer's requests.

{¶ 48} Pohmer does not articulate how the trial court abused its discretion in responding to his request for discovery. Pohmer's argument has less to do with the adequacy of the discovery process and more to do with Pohmer's dissatisfaction that he did not discover sufficient evidence to support his claims. The trial court noted it had made an effort throughout the case "to keep discovery proportionate to the issues, and to sensibly minimize the financial cost and time burden which electronic discovery might otherwise require." (Apr. 2, 2014 Journal Entry, 4.) Because the trial court did not abuse its discretion in denying in part Pohmer's motion to compel a forensic analysis of the email and Sametime message systems, we overrule Pohmer's third assignment of error.

VII. Fourth Assignment of Error – Whistleblower Claim

{¶ 49} In his fourth and final assignment of error, Pohmer argues the trial court erred when it granted JPMC's motion for summary judgment with respect to his whistleblower claim.

{¶ 50} Pohmer argues his termination was in retaliation for vocalizing complaints about JPMC's ECR campaign that Pohmer characterized as "a scam and a fraud." (Pohmer Brief, 57.)

{¶ 51} R.C. 4113.52, Ohio's whistleblower protection statute, states, in pertinent part:

> 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 the employee reasonably believes that the violation 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, a felony, or an improper solicitation for a contribution, 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*.

(Emphasis added.) R.C. 4113.52(A)(1)(a).

{¶ 52} In the context of a motion for summary judgment, the whistleblower plaintiff must first make a prima facie case by showing that (1) he engaged in activity which would bring him under the protection of the statute; (2) he was subject to an adverse employment action; and (3) there was a causal link between the protected activity and the adverse employment action. *Blackburn v. Am. Dental Ctrs.*, 10th Dist. No. 10AP-958, 2011-Ohio-5971, ¶ 8, citing *Wright v. Petroleum Helicopter, Inc.*, 8th Dist. No. 71168 (Sept. 18, 1997), citing *Cooper v. N. Olmstead*, 795 F.2d 1265, 1272 (6th Cir.1986).

{¶ 53} Ohio's whistleblower statute prohibits the discharge or discipline of an employee whose acts are protected by the statute's provisions. *Blackburn* at ¶ 7. "For an employee to be afforded protection as a 'whistleblower,' the employee must strictly comply with the requirements of R.C. 4113.52," and an employee's failure to strictly comply with the statute bars him or her from claiming the protections of the whistleblower statute. *Shaffer v. OhioHealth Corp.*, 10th Dist. No. 04AP-236, 2004-Ohio-6523, ¶ 14, citing *Contreras v. Ferro Corp.*, 73 Ohio St.3d 244 (1995), syllabus; *Blackburn* at ¶ 7.

{¶ 54} R.C. 4113.52(A)(1)(a) is explicit that an employee must first orally notify his supervisor or other responsible officer of his reasonable belief of a criminal violation and then must file a written report with that same supervisor or responsible officer. In order to comply with R.C. 4113.52(A)(1)(a), the written report must "[provides] sufficient detail to identify and describe the violation." The written report, as used in the whistleblower statute, is " 'more than mere idle conversation' " and " 'means delivery of accumulated information to a proper authority with an expectation that such authority will act on the information set forth.' " *Blackburn* at ¶ 13, quoting *Wood v. Dorcas*, 142 Ohio App.3d 783, 790 (6th Dist.2001).

{¶ 55} Although Pohmer asserts on appeal that there is "a major disputed fact" as to whether Pohmer ever complained to Kaalund in writing about the ECR product, the record undermines his argument. (Pohmer Brief, 14.) Pohmer stated in his deposition that he orally informed Kaalund about his concerns with the ECR product, but he did not mention providing Kaalund with a written report documenting the alleged violation. Kaalund never indicated he received a written report from Pohmer, instead testifying that Pohmer "never complained" about the ECR product itself and only complained "about the

people receiving credit and masking the fact we were losing clients." (Kaalund Deposition, 150.) Nothing else in the voluminous record even approximates a written report to Kaalund detailing Pohmer's concerns about the ECR product.

{¶ 56} Pohmer argues he did follow-up his oral complaints with written emails to Kaalund detailing his concerns, but those alleged emails are not in the record. Though Pohmer suggests JPMC may have acted to delete or otherwise withhold those emails, the basis for his forensic analysis request in his motion to compel discovery, he points to no Civ.R. 56 evidence to support this claim. Having already determined that the trial court did not abuse its discretion in denying Pohmer's motion to compel a forensic analysis of his company email account, Pohmer is unable to substantiate his whistleblower claim.

{¶ 57} Because Pohmer did not strictly comply with R.C. 4113.52(A)(1)(a) and provide his supervisor with a sufficiently detailed written report, his whistleblower claim fails as a matter of law. Accordingly, the trial court did not err in granting JPMC's motion for summary judgment on this claim, and we overrule Pohmer's fourth assignment of error.

VIII. Disposition

{¶ 58} Based on the foregoing reasons, the trial court erred in granting JPMC's motion for summary judgment with respect to Pohmer's claims for unjust enrichment and quantum meruit, but the trial court did not err in granting JPMC's motion for summary judgment with respect to the reverse race discrimination and whistleblower claims. Additionally, the trial court did not abuse its discretion in denying in part Pohmer's motion to compel discovery. Having sustained Pohmer's first assignment of error and overruled Pohmer's second, third, and fourth assignments of error, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas and remand this matter to that court for further proceedings consistent with this decision.

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

BROWN, P.J., and BRUNNER, J., concur.