[Cite as *Felts v. Ohio Dept. of Rehab. & Corr.*, 2008-Ohio-4797.]

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

BRIAN FELTS

Plaintiff

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant

Case No. 2007-03552

Judge Clark B. Weaver Sr.

DECISION

{¶ 1} On June 11, 2008, defendant filed a motion for judgment on the pleadings, pursuant to Civ.R. 12(C). On June 17, 2008, plaintiff filed a motion to strike defendant's motion. On July 2, 2008, defendant filed a memorandum contra to plaintiff's motion to strike. The case is now before the court for non-oral hearing.

{¶ 2} Civ.R. 12(C) provides that: "[a]fter the pleadings are closed but within such times as not to delay the trial, any party may move for judgment on the pleadings." The trial in this case is scheduled for *October 20-21, 2008*. Further, Civ.R. 12(F) provides in pertinent part that: "[u]pon motion made by a party * * * or upon the court's own initiative at any time, the court may order stricken from any pleading an insufficient claim or defense or any redundant, immaterial, impertinent or scandalous matter." The court finds that defendant's motion was filed sufficiently in advance of trial that no delay in proceedings will be required, nor is there any material in the motion that qualifies to be stricken. Therefore, plaintiff's motion to strike defendant's motion for judgment on the pleadings is DENIED. To the extent that plaintiff's motion is also intended to serve as a memorandum contra to defendant's motion it is construed as such.

{¶ 3} "Under Civ.R. 12(C), dismissal is appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570, 1996-Ohio-459. Thus, Civ.R. 12(C) requires the court to determine that no issues of material fact exist

and that the movant is entitled to judgment as a matter of law. Id. (Additional citations omitted.)

{¶ 4} Plaintiff is a Corrections Officer (CO) at defendant Southern Ohio Correctional Facility. This case arises as a result of an injury plaintiff sustained when he assisted in breaking up an altercation between two inmates. One of the inmates had a pair of metal crutches and was attempting to strike another inmate with them; plaintiff was struck on the head with one of the crutches after he had responded to the fight. Plaintiff alleges that, in contravention of defendant's internal policies and procedures, Inmate Watley was provided the crutches even though his medical authorization for them had expired; that he was permitted to go to recreation despite his medical restriction; and that he was not secured to a chain while being escorted to and from the recreation area. In his complaint, plaintiff asserts three causes of action: negligence, retaliation, and violation of public policy. Defendant has moved for judgment on each of plaintiff's claims.

{¶ 5} With respect to the negligence claim, defendant argues that such claims are preempted by the Ohio Workers' Compensation Act. The court agrees. It is well-settled that "[t]he workers' compensation system is based on the premise that an employer is protected from a suit for negligence in exchange for compliance with the Workers' Compensation Act." *Blankenship v. Cincinnati Milacron Chems.* (1982), 69 Ohio St.2d 608, 614. In both his complaint and his motion to strike, plaintiff acknowledges that injuries alleged were sustained in the course of his employment with defendant. Accordingly, there are no genuine issues of fact with regard to the negligence claim and defendant is entitled to judgment on that claim as a matter of law.

{¶ 6} However, plaintiff has argued that he is not precluded from bringing an intentional tort claim against defendant. The court recognizes that "the protection afforded by the [Workers' Compensation] Act has always been for negligent acts and not for intentional tortious conduct." Id. In addition, the Tenth District Court of Appeals has held that "'a complaint should not be dismissed merely because a plaintiff's

allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory. Nor should a complaint be dismissed that does not state with precision all the elements that give rise to a legal basis for recovery.'" *Rogers v. Targot Telemarketing Services* (1990), 70 Ohio App.3d 689, 692 quoting *Thomas W. Garland, Inc. v. St. Louis* (C.A. 8, 1979), 596 F.2d 784. (Additional citation omitted.) In this case, even making all reasonable inferences in favor of plaintiff, the court finds no language in the complaint that could arguably be construed to assert a claim for a workplace intentional tort. See *Fyffe v. Jeno's, Inc*. (1991), 59 Ohio St.3d 115, paragraph one of the syllabus.

{¶ 7} For his retaliation claim, plaintiff asserts that he contacted the office of the state Inspector General after the assault to request an investigation into defendant's alleged violations of policy; that an investigation did take place; and that he has since been "intentionally and maliciously harassed, hassled and beleaguered * * * to the point where he can no longer effectively carry out his job responsibilities" and that defendant "has endangered him by making him a potential target to inmates." The complaint does not assert any state or federal law as a basis for the claim. Defendant argues that, to the extent that plaintiff is making such a claim it must fail as a matter of law. The court agrees.

{¶ 8} In order to establish a prima facie claim of retaliation under either R.C. 4112.02(I) or 42 U.S.C. 2000e-3(a), plaintiff must demonstrate that: 1) he engaged in a protected activity under federal or Ohio law; 2) he was the subject of adverse employment action; and, 3) there was a causal link between his protected activity and the adverse action of his employer. *Cooper v. City of North Olmsted* (C.A. 6, 1986), 795 F.2d 1265, 1272. See also *Zacchaeus v. Mt. Carmel Health Sys*., Franklin App. No. 01AP-683, 2002-Ohio-444.

{¶ 9} The first element of the prima facie case is that plaintiff engaged in a "protected activity," specifically, that plaintiff opposed an unlawful employment practice

by defendant. "An unlawful employment practice is one which involves either (1) discriminating 'against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin*,' or (2) limiting, segregating, or classifying employees 'in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of such individual's race, color, religion, sex, or national origin*.'" *Bowen v. Jameson Hospitality, LLC* (2002), 214 F.Supp.2d 1372, 1380, quoting 42 U.S.C. 2000e-2. (Emphasis added.) To show that he engaged in a protected activity, plaintiff must establish that he had a "good faith, reasonable belief" that defendant had engaged in unlawful discrimination as defined by federal and state law. Id.

{¶ 10} There is no suggestion in the complaint that plaintiff requested an investigation into any action on the part of defendant relating to his race, color, religion, sex or national origin. Therefore, the court finds that the only reasonable conclusion to be drawn from the pleadings is that plaintiff did not engage in a protected activity. Accordingly, having failed to satisfy this element of a prima facie case, any statutorily-based retaliation claim fails as a matter of law. See *Motley v. Ohio Civ. Rights Comm.*, Franklin App. No. 07AP-923, 2008-Ohio-2306. Moreover, to the extent that plaintiff is attempting to assert a whistleblower retaliation claim under either R.C. 4113.52 or 124.341, this court is without jurisdiction to determine such causes of action. *Dargart v. Ohio Dept. of Transp*., Ct. of Cl. No. 2002-09668, 2005-Ohio-4463.

{¶ 11} Nevertheless, when read in conjunction with plaintiff's third cause of action, the second claim may be construed to set forth a common law cause of action for retaliation in violation of public policy. For his third claim, plaintiff alleges that "[there] is a clear public policy in Ohio which entitles employees to report violations of policy that place workers in imminent danger of physical harm." Defendant argues that, under Ohio law, only claims of wrongful termination in violation of public policy are recognized and that plaintiff's complaint states that he is still employed by defendant. Defendant

further argues that a valid claim of this nature may be brought only by employees-at-will, and that plaintiff's complaint does not specify his employment classification. While the court agrees that plaintiff's status as an employee-at-will is not stated, the court notes that a public policy claim may be brought by employees who have been either "discharged or disciplined." *Greeley v. Miami Valley Maintenance Contrs., Inc*. (1990), 49 Ohio St.3d 228, paragraph one of the syllabus. "'Clear public policy' sufficient to justify an exception to the employment-at-will doctrine is not limited to public policy expressed by the General Assembly in the form of statutory enactments, but may also be discerned as a matter of law based on other sources, such as the Constitutions of Ohio and the United States, administrative rules and regulations, and the common law.'" *Painter v. Graley*, 70 Ohio St.3d 377, 1994-Ohio-334, paragraph three of the syllabus.

{¶ 12} Upon review of the complaint in its entirety, the court concludes that, assuming that plaintiff was an employee-at-will, and that his allegations of being harassed, hassled, and beleaguered include some form of disciplinary action being taken against him, the complaint arguably sets forth a claim of retaliation in violation of public policy. See *Edwards v. Dubruiel*, Greene App. No. 2002 CA 50, 2002-Ohio-7093, but cf. *Strausbaugh v. Ohio Dept. of Transp*., 150 Ohio App.3d 438, 449, 2002-Ohio-6627.

{¶ 13} In conclusion, defendant's motion for judgment on the pleadings shall be granted, in part, as to plaintiff's negligence, workplace intentional tort, and statutory retaliation claims, and shall be denied, to the extent that plaintiff's second and third causes of action can be construed as a claim of retaliation in violation of public policy.

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JUDGMENT ENTRY

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A non-oral hearing was conducted in this case upon defendant's motion for judgment on the pleadings and plaintiff's motion to strike. For the reasons set forth in the decision filed concurrently herewith, plaintiff's motion to strike is DENIED. Defendant's motion for judgment on the pleadings is GRANTED, in part, as to plaintiff's negligence, workplace intentional tort, and retaliation claims, and is DENIED, to the extent that plaintiff's second and third causes of action can be construed as a claim of retaliation in violation of public policy.

_____

CLARK B. WEAVER SR.
Judge

cc:

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LH/cmd
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