

# 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

TRAVIS MCCULLOCH

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2013-00637

Judge Patrick M. McGrath  
Magistrate Anderson M. Renick

## DECISION

{¶1} On February 6, 2014, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On February 20, 2014, plaintiff filed a response. The case is now before the court for a non-oral hearing on defendant's motion. Civ.R. 56(C); L.C.C.R. 4.

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can 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 or stipulation construed most strongly in the party's favor." See *also*

*Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶4} On November 16, 2012, plaintiff completed an employment application with defendant the Ohio Department of Transportation (ODOT). As part of his application, plaintiff provided responses to questions about his education which were relevant to the position. In his application, plaintiff stated the following: “Also just got my commercial license to spray.” On January 14, 2013, plaintiff began working for ODOT in a full-time, probationary position, as a Highway Technician I. Plaintiff’s duties included spraying vegetation and signing pesticide reports wherein he was required to provide a spraying license number.

{¶5} On May 24, 2013, plaintiff met with John Shore, an investigator for ODOT, to discuss whether plaintiff had a commercial license to spray vegetation. Plaintiff testified during his deposition that he did not have a commercial license to spray vegetation either at the time he submitted his application or at the time of the meeting with Shore. (Plaintiff’s Deposition, page 45-46.) On May 31, 2013, plaintiff resigned his position as a probationary employee after he was notified that defendant intended to terminate his employment based upon false statements in his employment application. *Id.* at page 17.

{¶6} Plaintiff contends that he did not believe that a commercial spraying license was required to apply for the Highway Technician I position and that he had successfully completed an examination to obtain the license several days prior to submitting his employment application. In his affidavit, plaintiff states that he asked his manager “about the fact that [plaintiff] did not have a [spraying license card] while others did,” but he was “ignored.” According to plaintiff, defendant wrongfully terminated his employment. Specifically, plaintiff alleges wrongful discharge in violation of public policy, fraud, and defamation.

## **WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY**

{¶7} It is undisputed that plaintiff was a probationary, at-will employee. “As a probationary civil service employee, [plaintiff] had no property interest in continued employment sufficient to warrant procedural due process protection because [his] appointment was not final until he satisfactorily completed [his] probationary period.” *State ex rel. Rose v. Ohio Dept. of Rehab. & Corr.*, 91 Ohio St.3d 453, 458 (2001);

*Wissler v. Ohio Dept. of Job & Family Servs.*, 10th Dist. Franklin No. 09AP-569, 2010-Ohio-3432; *Browning v. Ohio State Hwy. Patrol*, 151 Ohio App.3d 798, 2003-Ohio-1108 (10th Dist.). As a general rule, the common law doctrine of employment-at-will governs employment relationships in Ohio. *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994.

{¶8} In an at-will employment relationship, either an employer or an employee may legally terminate the employment relationship at any time and for any reason. *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 103 (1985). However, a public policy exception to the employment-at-will doctrine applies “when an employee is discharged or disciplined for a reason which is prohibited by statute.” *Greeley v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228, 234 (1990). The public policy 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 by the Ohio judiciary based on sources such as the Constitutions of Ohio and the United States, legislation, administrative rules and regulations, and the common law.” *Painter v. Graley*, 70 Ohio St.3d 377, 383-384 (1994).

{¶9} In order to establish a claim for wrongful termination in violation of public policy, plaintiff must prove: 1) a clear public policy manifested in a statute, regulation, or the common law (the clarity element); 2) that discharging an employee under circumstances like those involved would jeopardize the policy (the jeopardy element); 3) that the discharge at issue was motivated by conduct related to the policy (the causation element); and 4) that there was no overriding business justification for the discharge (the overriding justification element). *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 151 (1997). The clarity and jeopardy elements are questions of law, while causation and overriding justification elements are questions of fact. *Collins v. Rizkana*, 73 Ohio St.3d 65, 70 (1995).

{¶10} Plaintiff contends that termination of his position under the circumstances would jeopardize regulations regarding commercial spraying and the use of pesticides and herbicides, and that plaintiff’s dismissal was motivated by conduct related to the public policy. However, plaintiff has not cited any authority to support his contention that regulations related to commercial spraying manifest a clear public policy.

{¶11} Even if the court determined that plaintiff had identified a clear public policy to protect a specific public interest sufficient to justify an exception to the at-will

doctrine, there is no question that defendant's investigation of plaintiff's statements on his application was related to defendant's efforts to comply with those regulations. It is clear that defendant's investigation, which resulted in plaintiff's decision to resign his position, did not jeopardize the policy.

{¶12} Defendant maintains that its decision to institute the probationary removal was based solely upon learning that plaintiff's employment application contained false representations and thus, it had an overriding business justification for terminating his probationary position. Although plaintiff suggests that he was "actively deceived" into spraying without a commercial spray license and that defendant decided to end his probationary employment to "cover their tracks" after learning that plaintiff did not possess such license, it was plaintiff who was responsible for obtaining the license and he represented that he possessed the license. Plaintiff's self-serving averment that no ODOT manager asked to see the license does not create a genuine issue of material fact regarding the false statement contained in plaintiff's employment application.

{¶13} Therefore, the court finds that there are no genuine issues of material fact as to whether there was an overriding business justification for plaintiff's probationary removal. Accordingly, defendant is entitled to judgment as a matter of law on plaintiff's claim for wrongful discharge in violation of public policy.

## **FRAUD**

{¶14} "Fraud is defined as: (1) a representation or, where there is a duty to disclose, concealment of a fact; (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 or concealment; and (6) a resulting injury proximately caused by the reliance." *Martin v. Ohio State Univ. Found.*, 139 Ohio App.3d 89, 98 (2000).

{¶15} Plaintiff alleges in his complaint that defendant was aware that plaintiff needed a spray license card, but that Jeffrey Hill, plaintiff's supervisor, intentionally failed to inform him that he needed the license. (Complaint, ¶ 9.) However, in his deposition, plaintiff testified that Hill never made any false statement to him. (Plaintiff's deposition, page 50.) Furthermore, plaintiff acknowledged that Hill did not know that plaintiff did not have a license to spray vegetation. (*Id.*, pages 55-56.) Indeed, it was

plaintiff who made a false statement on his employment application that he possessed a spraying license. Accordingly, the only reasonable conclusion to be drawn is that Hill did not misrepresent defendant's policies concerning the requirement for a vegetation spraying license.

## DEFAMATION

{¶16} Plaintiff alleges that defendant's employees falsely informed potential employers that he had made false statements on his employment application, that the act of terminating his employment at ODOT interfered with his later attempts to find employment, and that such conduct amounts to defamation.

{¶17} Defamation, which includes both libel and slander, is a false publication causing injury to a person's reputation, exposing the person to public hatred, contempt, ridicule, shame or disgrace, or affecting the person adversely in his or her trade or business. *Sweitzer v. Outlet Communications, Inc.*, 133 Ohio App.3d 102, 108 (1999).

The essential elements of a defamation action are that a false statement was made, that the false statement was defamatory, that the false defamatory statement was published, that plaintiff was injured and that defendant acted with the required degree of fault. *Celebrezze v. Dayton Newspapers, Inc.*, 41 Ohio App. 3d 343, 346 (1988).

{¶18} Plaintiff has not identified any false statement that was published to another party. Plaintiff testified that he was not aware of any false statement made by Hill or any other employee of defendant. Plaintiff further testified that he did not know whether Hill published any information regarding plaintiff making a false statement, except for an email from a union employee who was allegedly told by plaintiff's supervisor that plaintiff had been dishonest. (Deposition, page 52-53.)

{¶19} An adverse employment action is not a "statement," it is an action. *Lawson v. AK Steel Corp.*, 121 Ohio App.3d 251, 257 (1997). In addition, "communications between an employer and an employee, or between two employees, concerning the conduct of a third employee or former employee, are qualifiedly privileged, and thus, even though such a communication contain matter defamatory to such other or former employee, he cannot recover in the absence of sufficient proof of actual malice to overcome the privilege of the occasion." *McKenna v. Mansfield Leland Hotel Co.*, 55 Ohio App. 163, 167 (1936); *Plouffe v. Ohio State Univ., Ct. of Cl.*

No. 2001-08048, 2004-Ohio-4716, ¶ 19-21; *Georgalis v. Ohio Tpk. Commn.*, 10th Dist. Franklin No. 94478, 2010-Ohio-4898, ¶ 25-26.

{¶20} Upon review of the motion and the memoranda presented, and construing the evidence most strongly in favor of plaintiff, the court finds that reasonable minds can come but to one conclusion, which is adverse to plaintiff regarding his claim of defamation.

{¶21} For the foregoing reasons, the court finds that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. Accordingly, defendant's motion for summary judgment shall be granted.

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PATRICK M. MCGRATH  
Judge

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## JUDGMENT ENTRY

{¶22} A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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PATRICK M. MCGRATH  
Judge

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