**[Cite as *Jacobs v. Highland Cty. Bd. of Commrs.*, 2014-Ohio-4194.]**

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

| | | |
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| WENDY JACOBS, | : | |
| | : | |
| Plaintiff-Appellant, | : | Case No. 13CA20 |
| | : | |
| vs. | : | |
| | : | |
| HIGHLAND COUNTY BOARD, OF COMMISSIONERS, et al. | : | DECISION AND JUDGMENT ENTRY |
| | : | |
| Defendants-Appellees. | : | **Released: 09/16/14** |

APPEARANCES:

Stephen A. Simon, Tobias, Torchia & Simon, Cincinnati, Ohio, for Appellant.

Jeffrey A. Stankunas and Aaron M. Glasgow, Isaac Wiles Burkholder & Teetor LLC, Columbus, Ohio, for Appellees.

McFarland, J.

**{¶1}** Wendy Jacobs appeals the decision of the Highland County Court of Common Pleas granting summary judgment in favor of Appellees, Highland County Board of Commissioners, et al., with respect to her claim for wrongful discharge in violation of public policy. On appeal, Appellant raises only one assignment of error, contending that the trial court erred, as a matter of law, in granting summary judgment on her wrongful discharge claim. Because we conclude that Appellant failed to demonstrate her

termination was in contravention of a clear public policy, she has failed to meet the clarity element of her wrongful discharge claim and, as such, her claim fails as a matter of law. Accordingly, Appellant's sole assignment of error is without merit and the decision of the trial court granting summary judgment in favor of Appellees is affirmed.

## FACTS

**{¶2}** Appellant, Wendy Jacobs, was employed as the director of Highland County Children Services from 2007 until June 30, 2011, at which time Highland County Children Services was dissolved as an independent agency and merged into Highland County Department of Job and Family Services. After the merger, Appellant was hired as a social services supervisor, for a probationary term of six months, and reported to Deborah Robbins, director of the department. Thus, Appellant's employment as social services supervisor with the department began on July 1, 2011.

**{¶3}** The record reveals that on July 20, 2011, Appellant was notified that a child fatality had occurred in a dependency case the agency was handling. After conducting her investigation, Appellant decided that two of her subordinates who were assigned to that case should be disciplined as a result of their failures in handling the case. Appellant met with Robbins to discuss these recommendations, however, Robbins disagreed with them. By

the end of the meeting, Appellant and Robbins agreed that no discipline should be administered. Subsequently, Appellant reconsidered and informed Robbins by email that she believed the employees should be disciplined.

**{¶4}** On August 3, 2011, Robbins met with a member of the Highland County Board of Commissioners, Shane Wilkin, to discuss Appellant's employment, complaints that had been made about her, and ultimately her termination. That same day, Appellant was provided with a letter notifying her she was being placed on administrative leave with pay, pending termination by the Highland County Board of Commissioners. The letter indicated Appellant had failed to meet Robbins' expectations for performing work for the department of job and family services. Thereafter, Appellant was terminated on August 10, 2011.

**{¶5}** Appellant filed a complaint alleging wrongful discharge in violation of public policy on April 20, 2012. Appellant alleged that at all times she was acting pursuant to R.C. 5153.16, which governs powers and duties of public children services agencies. She further alleged that her subordinate's failures constituted clear violations of OAC 5101:2-37-01(C), OAC 5101:2-37-02(B)(4), OAC 5101:2-37-02(N)(1), OAC 5101:2-37-03(D), OAC 5101:2-36-03(Q) and OAC 5101:2-36-03(T). Appellant alleged that read together, these revised and administrative code provisions

"reflect[] the critical obligations of public children services agencies personnel to provide public care and protective services to vulnerable children in need." Appellees filed an answer asserting, among other defenses, the defense that Appellant had failed to identify a clear public policy that was violated by her termination. Appellees followed with a motion for judgment on the pleadings, contending that by failing to identify a clear public policy, Appellant had failed to satisfy the clarity element of her wrongful discharge claim and thus failed to state a claim for relief. Appellees' motion, however, was denied by the trial court.

**{¶6}** Thereafter, Appellees filed a motion for summary judgment on April 5, 2013. In that motion, Appellees argued that Appellant's termination was not related to her effort to have her subordinates disciplined, but rather was related to her management style. A review of the record indicates that Robbins testified during her deposition regarding her reasons for terminating Appellant, which included Appellant's use of profanity in the workplace, her dictatorial and bullying style of dealing with others, office tension and high turnover as a result, as well as Appellant's poor working relationship with local officials, including the county prosecutor. Supplemental briefing was requested by the trial court on the public policy issue/clarity element earlier raised in the motion for judgment on the pleadings. After supplemental

briefing was concluded, the trial court granted summary judgment in favor of Appellees on July 31, 2013. It is from this order that Appellant now brings her appeal, assigning a single issue for our review.

ASSIGNMENT OF ERROR

"I. THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN GRANTING SUMMARY JUDGMENT UNDER OHIO CIV. PRO. 56(C) ON PLAINTIFF'S CLAIM OF WRONGFUL DISCHARGE AGAINST DEFENDANTS ."

LEGAL ANALYSIS

**{¶7}** In her sole assignment of error, Appellant contends that the trial court erred in granting summary judgment in favor of Appellees with respect to her claim for wrongful discharge in violation of public policy. The record reveals that the trial court determined Appellant failed to set forth a clear public policy that was violated as a result of her termination and, as such, that Appellant failed, as a matter of law, to satisfy all of the requisite elements of her claim. Thus, we begin by considering our proper standard of review, as well as the substantive law related to wrongful discharge claims.

SUMMARY JUDGMENT STANDARD

**{¶8}** Appellate courts conduct a de novo review of trial court summary judgment decisions. E.g., *Troyer v. Janis*, 132 Ohio St.3d 229, 2012-Ohio-2406, 971 N.E.2d 862, ¶ 6; *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, an appellate court

must independently review the record to determine if summary judgment is appropriate and need not defer to the trial court's decision. E.g., *Brown v. Scioto Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (1993); *Morehead v. Conley*, 75 Ohio App.3d 409, 411-12, 599 N.E.2d 786 (1991). To determine whether a trial court properly granted a summary judgment motion, an appellate court must review the Civ.R. 56 summary judgment standard, as well as the applicable law. Civ. R. 56(C) provides in relevant part:

> "* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, 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."

**{¶9}** Thus, pursuant to Civ.R. 56, a trial court may not grant summary judgment unless the evidence demonstrates that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and after viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. E.g., *Smith v. McBride*, 130 Ohio St.3d 51, 2011-Ohio-4674, 955 N.E.2d 954, ¶ 12; *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 24; *Vahila v. Hall*, 77 Ohio St.3d 421, 429-30, 674 N.E.2d 1164 (1997).

**{¶10}** In responding to a motion for summary judgment, the nonmoving party may not rest on "unsupported allegations in the pleadings." *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46, 47 (1978). Rather, Civ.R. 56 requires the nonmoving party to respond with competent evidence that demonstrates the existence of a genuine issue of material fact. Specifically, Civ.R. 56(E) provides:

"* * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest

> upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

**{¶11}** Consequently, once the moving party satisfies its Civ.R. 56 burden, the nonmoving party must demonstrate, by affidavit or by producing evidence of the type listed in Civ.R. 56(C), that a genuine issue of material fact remains for trial. A trial court may grant a properly supported motion for summary judgment if the nonmoving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that there is a genuine issue for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); *Jackson v. Alert Fire & Safety Equip., Inc.*, 58 Ohio St.3d 48, 52, 567 N.E.2d 1027 (1991).

**{¶12}** The substantive law determines whether a genuine issue of material fact remains. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 106 S.Ct. 2505 (1986); *Turner v. Turner*, 67 Ohio St.3d 337, 340, 617 N.E.2d 1123 (1993); *Perez v. Scrips-Howard Broadcasting Co.*, 35 Ohio St.3d 215, 218-19, 520 N.E.2d 198 (1988). As the court stated in *Anderson*:

"Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson* at 248. Thus, to determine whether any of appellant's claimed factual disputes present genuine issues of material fact that preclude summary judgment, we must examine the substantive law that governs each claim.

**{¶13}** Because this case involves a claim of wrongful discharge in violation of public policy, the elements of which will be discussed more fully below, after being confronted with a motion for summary judgment asserting the nonmoving party has not identified a public policy applicable to the incident, the nonmoving party then has "the reciprocal burden of articulating, by citation of its source, a specific clear public policy." *Dohme v. Eurand America, Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, 956 N.E.2d 825, ¶ 19.

WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

**{¶14}** In Ohio, the common-law doctrine of employment at-will 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 America, Inc.* at ¶ 17; citing *Collins v.*

*Rizkana*, 73 Ohio St.3d 65, 67, 652 N.E.2d 653 (1995). 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, 639 N.E.2d 51 (1994), paragraph three of the syllabus.

**{¶15}** To establish a prima facie claim of wrongful discharge in violation of public policy, the employee must demonstrate the following four elements:

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

> element).” ’ ” *Dohme* at ¶ 12; citing *Painter* at 384, fn. 8; quoting Perritt, The Future of Wrongful Dismissal Claims: Where Does Employer Self–Interest Lie? (1989), 58 U.Cin.L.Rev. 397, 398–399. See also *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, 875 N.E.2d 36, ¶ 8-12.

The clarity and jeopardy elements involve questions of law, whereas the causation and overriding justification elements involve questions of fact. *Rose v. CTL Aerospace, Inc*., 12th Dist. Butler No. CA2011-09-171, 2012-Ohio-1596, ¶ 22; citing *Collins* at 70.

**{¶16}** The Supreme Court of Ohio, in *Painter v. Graley*, stated that a claim of wrongful discharge in violation of public policy must allege that the firing contravened a “clear public policy.” *Painter* at paragraph two of the syllabus. It has further been explained that a public policy sufficient to overcome the presumption in favor of employment at will is not limited to instances in where the statute expressly forbids termination, but may be discerned from legislation generally, or from other sources of law. *Powers v. Springfield City Schools*, 2nd Dist. Clark No. 98-CA-10, 1998 WL 336782, *4; citing *Painter* at 384. However, the Painter Court also admonished “that an exception to the traditional doctrine of employment-at-will should be

recognized only where the public policy alleged to have been violated is of equally serious import as to a violation of a statute. *Painter* at 384; citing *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St.3d 228, 234, 551 N.E.2d 981(1990).

**{¶17}** Here, Appellant's complaint alleged she was terminated after she advocated for the discipline of two of her subordinates who, in Appellant's view, had failed to comply with certain provisions of the Ohio Administrative Code, including OAC 5101:2-37-01(C), OAC 5101:2-37-02(B)(4), OAC 5101:2-37-02(N)(1), OAC 5101:2-37-03(D), OAC 5101:2-36-03(Q) and OAC 5101:2-36-03(T). These Administrative Code provisions address the requirements for public children services agencies ("PCSAs") for safety planning, completing the safety plan, completing a family assessment, and assessment and investigations of intra-familial child abuse and neglect. She further alleged that she was, at all times, acting to ensure the agency's compliance with the applicable laws protecting the welfare of children, which she claims was required by R.C. 5153.16

**{¶18}** In the wrongful discharge count contained in her complaint, Appellant alleged that "Ohio law has a clear public policy manifested in O.R.C. Chapter § 5153, including but not limited to §5153.16, and the applicable regulations under Ohio Administrative Code Chapter 5101:2,

including but not limited to those regulations cited herein, reflecting the critical obligations of public children services agencies personnel to provide public care and protective services to vulnerable children in need." Although Appellant alleged a "clear public policy" existed, she failed to articulate that policy. Rather, she simply relied upon the titles of the referenced revised and administrative code sections, which she states "reflect critical obligations" of public children service agencies. Thus, although Appellant repeatedly references a "clear public policy" and "well-established public policy," she never quite articulated what that policy is. As such, the allegations contained in her complaint are somewhat nebulous and fall short of demonstrating with sufficient clarity the existence of a clear public policy.

**{¶19}** It appears, as has been argued by Appellee throughout this litigation, that Appellant seems to be relying upon a broader policy "in favor of child protective services." This fact became evident during the motion phase of the litigation, which included a motion by Appellees for judgment on the pleadings, followed by a motion for summary judgment. At this stage Appellant continued to reference an elusive public policy, which she claimed was manifested in the cited revised and administrative code sections. Again, the closest Appellant came to articulating a policy was to state that "these

statutory provisions and regulations reflect the critical obligations of public children services agencies personnel to provide, care and protective services to vulnerable children in need." While we find that this is an accurate description of the purpose of these code provisions, we see no greater, overarching public policy related to child protective services that is manifested in them. Further, courts must be careful not to sua sponte presume sources of public policy, rather, it is the plaintiff's burden to do so. *Dohme* at ¶ 23. "An appellate court may not fill in the blanks on its own motion." Id.

**{¶20}** Appellees argued in their motion for summary judgment that "there is a basic disconnect between the various statutes and rules cited by Plaintiff as the source of public policy and the reasons why she claims she was fired." Appellees further argued that Appellant was relying exclusively upon "a series of statutes and rules having nothing to do [with] discipline within a PCSA." We agree with Appellees, noting that Appellant's argument that her termination violated the claimed public policy contained in these code provisions is rather tenuous. In fact, even if it could be said that the cited code sections do "manifest" some overarching public policy in favor of child protective services, which we do not agree that they do, we fail to see how Appellant's termination would violate such a policy.

*Galyean v. Greenwell*, 4th Dist. Washington No. 05CA11, 2007-Ohio-615, ¶ 52 (finding that although the appellant alleged the existence of a public policy and cited specific statutes in support, that the cited statutes were inapplicable to the facts therein). Instead, we find merit in Appellees' argument that Appellant's "argument is essentially that any action arguably undertaken to advance the interests of a PCSA is protected because the action supports the general policy in favor of child protective services."

**{¶21}** We do not believe that the recognition of such a broad public policy was intended when Ohio decided to recognize the public policy exception to the doctrine of at-will employment. Id. (finding that the cited statutes in support of the claimed public policy were not sufficiently specific to serve as a basis for the appellant's claim). Rather, not only should the claimed public policy exception to the at-will doctrine of employment be sufficiently clear, it should be narrowly applied. *Dean v. Consolidated Equities Realty*, 182 Ohio App.3d 725, 2009-Ohio-2480, 914 N.E.2d 1109, ¶ 12 (noting that "any exception to the at-will doctrine should be narrowly applied"); citing *Hale v. Volunteers of Am.*, 158 Ohio App.3d 415, 2004-Ohio-4508, 816 N.E.2d 259. In *Dean*, the court acknowledged Ohio's general public policy against fraud, but held that such policy was not manifested clearly enough to warrant abrogating the at-will employment

doctrine where the employee at issue was terminated after he spoke out about his employer's allegedly fraudulent conduct. *Dean* at ¶ 12.

**{¶22}** Appellant contends that this Court should be guided by cases like *Chapman v. Adia Services, Inc*., 116 Ohio App.3d 534, 688 N.E.2d 604 (1997), *Powers v. Springfield City Schools*, 2nd Dist. Clark No. 98-CA-10, 1998 WL 336782 (June 26, 1998), and *Sabo v. Schott*, 70 Ohio St.3d 527, 639 N.E.2d 783 (1994). *Chapman* involved an employee's constructive termination for consulting with an attorney regarding a personal injury suit against her employer's client. Although the *Chapman* trial court granted summary judgment in favor of Adia Services, Inc., the appellate court reversed, finding that three different sources of law provided a clear right to consult with counsel. *Chapman* at 542. Thus, *Chapman* involved a clear public policy related to the right and access to counsel.

**{¶23}** *Powers* involved a school counselor's claim she was not promoted because she reported an alleged incident of child abuse by the principal. *Powers* at *1. On appeal, the court found that Powers acted pursuant to R.C. 2151.421(A)(1)(a), which required her, as a school counselor, to immediately report her knowledge or suspicion of child abuse to a children's services agency or a municipal or county peace officer. Id. at *3. The *Powers* court found a clear public policy articulated in the statute

imposed a duty upon Powers to report, or possibly face civil liability, noting that an employee should not have to choose between possible termination and failure to execute a mandated civil obligation. Id. at *3-4; citing *Greeley* at 228. Thus, the *Powers* case involved a clear public policy in that it imposed an express duty upon Powers to report child abuse, which was violated when she was not promoted as a result of her compliance with the statute. Similar to *Powers*, *Sabo v. Schott* involved the termination of an employee for testifying "truthfully, albeit unfavorably" regarding his employer. *Sabo* at 527. The Supreme Court of Ohio held that such action was in violation of public policy. As such, much like *Powers*, Sabo was simply stating the truth, under oath, which he was required by law to do.

**{¶24}** We find these cases to be distinguishable both legally and factually from the case presently before us. Obviously, none of these cases involve the report of a PCSA worker for failing to perform their duties. Further, the cited cases each involve a very clear public policy, unlike the case at bar. Aside from directing this Court to several code provisions and noting those provisions set forth obligations of public children services agencies personnel, we see no clear public policy manifested in them which was contravened by Appellant's termination after she urged discipline for two subordinates after they failed, in her view, to complete their job duties

related to safety planning and family and child abuse assessments. These provisions express no clear reporting duty upon Appellant, rather, when compared to *Powers*, the distinction is that while Powers was required to make a report to PCSA, Appellant and her subordinates were, in fact, employed by PCSA, and there was no duty to report elsewhere any concern related to child safety. Rather, this was an internal personnel issue which we believe invokes no clear public policy.

**{¶25}** In light of the foregoing, we cannot conclude that Appellant carried her burden of demonstrating the existence of a clear public policy that was violated by her termination from an at-will employment position. Although Appellant sets forth multiple administrative and revised code sections which she claims clearly manifests a clear public policy that satisfies the clarity element of her wrongful discharge claim, we find no clear manifestation of any such policy. Rather, the cited code sections simply speak to the duties of public children service agencies. While we recognize the importance of fulfilling these duties, we cannot say that these code sections embody any clear public policy that was contravened by Appellant's termination.

**{¶26}** Because Appellant has not articulated a clear public policy applicable to her claim of wrongful discharge in violation of public policy

claim, she has failed to satisfy the clarity element of her claim. Because Appellant has failed to meet the clarity element, we do not reach the other elements of her claim. See *Dohme*, supra, at ¶ 26-27 (essentially stating that to do so would result in the issuance of an advisory opinion); *Painter v. Graley*, supra, at 385 (stopping its analysis after finding the clarity element was not satisfied). Thus, Appellant's claim fails, as a matter of law. Accordingly, the decision of the trial court granting summary judgment in favor of Appellees is affirmed.

**JUDGMENT AFFIRMED.**

Harsha, J., concurring:

**{¶27}** I concur in judgment and opinion except for the language in ¶20 that effectively concludes the statutes and rules that Jacobs cites do not "'manifest' some overreaching public policy in favor of child protective services * * *." I believe that they do. But I also conclude they do not afford Jacobs the protection she seeks.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellees recover of Appellant any costs herein.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, J.: Concurs in Judgment and Opinion.
Harsha, J.: Concurs with Concurring Opinion.

For the Court,

BY: _____
Matthew W. McFarland, Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**