[Cite as *Camick v. FirstEnergy Nuclear Operating Co.*, 2013-Ohio-4519.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Timothy Camick	Court of Appeals No. OT-12-019
Appellant	Trial Court No. 10-CV-320H
v.	
FirstEnergy Nuclear Operating Company, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: October 11, 2013

* * * * *

R. Michael Frank and John D. Franklin, for appellant.

Denise M. Hasbrook and Emily Ciecka Wilcheck, for appellees.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals a summary judgment issued by the Ottawa County Court of Common Pleas in favor of an employer in a wrongful termination suit. Because we conclude that appellant failed to present any false statement necessary to support a

defamation claim and did not specifically articulate a clear public policy that would exempt him from employment at will, we affirm.

{¶ 2} The facts of this matter are more fully discussed in the companion case, *Whitaker v. FirstEnergy Nuclear Operating Co.*, 6th Dist. Ottawa No. OT-12-021, 2013-Ohio-3856.

{¶ 3} Appellee FirstEnergy Nuclear Operating Company ("FENOC") is a wholly owned subsidiary of appellee FirstEnergy Corp. Appellant, Timothy Camick, was employed as a security supervisor at FENOC's Davis-Besse nuclear power plant near Oak Harbor, Ohio. Appellee David R. Kline was appellant's supervisor at Davis-Besse.

{¶ 4} In 2007, the Davis-Besse resident inspector for the Nuclear Regulatory Commission received an anonymous letter alleging irregularities in the reporting of work hours by security supervisors at the plant. The letter prompted an investigation in which time cards submitted by eight security supervisors, including appellant, were compared to electronic entry records into and out of the protected area of the plant over a period of approximately six months. The protected area is the part of the facility in which security supervisors primarily work.

{¶ 5} Discrepancies, hours reported worked in excess of time recorded in entry records, were noted in five of the eight security supervisors. All of these five, including appellant, were given the opportunity to explain the discrepancies. Taking into account the employees' explanations during the six-month period examined, Mark Whitaker had in excess of 70 hours overage and appellant had 39 hours overage. The remainder of the

supervisors had fewer than 19 hours in overages, which FENOC management attributed to inaccurate record keeping. Overages for Whitaker and appellant, however, FENOC managers considered excessive and is the reason, appellees maintain, that both employees were discharged from the company.

{¶ 6} After his discharge, appellant was classified in a national database of employees with nuclear access clearance as "Additional Information Subsequent to Termination," a category indicating that the former employer had potentially disqualifying information for access to a nuclear facility. Appellant believes this classification resulted in denial of employment for him at two other nuclear facilities.

{¶ 7} On May 3, 2010, appellant filed a seven-count complaint alleging that his discharge violated the Ohio Whistleblower Act, two varieties of public policy and constituted gender and race discrimination. Appellant claimed that his discharge was not for timecard irregularities, but in retaliation for security reports he had submitted to the company three years earlier, in 2004, and statements he made to a company trainer. Appellant also alleged his classification in the nuclear access database was defamatory. Named defendants were appellees FENOC, FirstEnergy Corp. and David Kline. Several other FENOC managers originally named as defendants were later dismissed from the case by appellant.

{¶ 8} Appellees denied wrongdoing and the matter proceeded into extensive discovery. On May 2, 2011, appellees moved for summary judgment. Appellant filed a memorandum in opposition, then dismissed most of the individual defendants and two

counts of the complaint, leaving five counts against appellees FENOC, FirstEnergy Corp. and David Kline.

{¶ 9} On June 7, 2012, the trial court granted summary judgment to appellees. The court found that with respect to the statutory whistleblower allegation, appellant failed to present evidence that he was terminated in retaliation for reporting a criminal offense by a fellow employee that posed imminent risk of physical harm, a hazard to the public or a felony. The court concluded that appellant's public policy claim failed because appellant did not identify with specificity a provision in the federal or state constitution, statute, administrative rule or common law necessary to claim wrongful discharge. The court found that appellant had failed to set forth any evidence supporting his claim that he, a Caucasian male, was discriminated against on the basis or either race or gender. The court concluded that FENOC's report of appellant's status to the nuclear access database not to be defamatory, because the report was true.

{¶ 10} From this judgment, appellant brings this appeal. Appellant sets forth the following two assignments of error:

> I. The trial court committed prejudicial and reversible error when it granted Appellees' Motion for Summary Judgment on Count Two [the workplace safety public policy claim] given there are genuine issues of factual dispute in the record and Appellees are not entitled to judgment as a matter of law.

II. The trial court committed prejudicial and reversible error when it granted Appellees' Motion for Summary Judgment on Count Seven [the defamation claim] given there are genuine issues of factual dispute in the record and the Appellees are not entitled to judgment as a matter of law.

{¶ 11} Appellant's assigned errors duplicate those raised by Mark Whitaker. Our decision is the same. We shall discuss appellant's assignments of error in reverse order.

I. Defamation

{¶ 12} Appellant, like Whitaker, fails to prevail on the defamation claim because he failed to point out anything entered into the national nuclear access database or otherwise published by any defendant that was untrue. Truth is an absolute defense to a claim of defamation. *Whitaker*, 6th Dist. Ottawa No. OT-12-021, 2013-Ohio-3856, at ¶ 44.

{¶ 13} When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (8th Dist.1996), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

{¶ 14} Appellant failed to produce any evidence of a falsehood published by any of appellees. Accordingly, appellant's second assignment of error is not well-taken.

II. Workplace Safety Public Policy Claim

{¶ 15} With respect to appellant's public policy claim, Ohio is an employment-at-will state. An at-will employee may be terminated for any reason not contrary to law. *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 483 N.E.2d 150 (1985), paragraph one of the syllabus. An exception to this rule exists when an employee is discharged or disciplined in violation of a clear public policy. In such a circumstance, an employee may sue for wrongful discharge in violation of public policy. *Greeley v. Miami Valley Maintenance Contr.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990), paragraphs two and three of the syllabus.

{¶ 16} To prevail in an action alleging a wrongful discharge in violation of clear public policy, a plaintiff must prove:

{¶ 17} "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).

{¶ 18} "2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the *jeopardy* element).

{¶ 19} "3. The plaintiff's dismissal was motivated by conduct related to the public policy (the *causation* element).

{¶ 20} "4. The employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element)." (Emphasis sic.) *Dohme v. Eurand Am., Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, 956 N.E.2d 825, ¶ 13-16, *quoting Painter v. Graley*, 70 Ohio St.3d 377, 384, 639 N.E.2d 51 (1994), at fn. 8.

{¶ 21} The first two elements are questions of law; the remaining two are questions of fact. *Id.* at ¶ 17. If a party with the burden of proof on a motion for summary judgment fails to present proof sufficient to establish a question of material fact for each of these elements, the claim must fail. *Whitaker*, 6th Dist. Ottawa No. OT-12-021, 2013-Ohio-3856, at ¶ 17, *citing Mangino v. W. Reserve Fin. Corp.*, 9th Dist. Wayne No. 11-CA-0050, 2012-Ohio-3874.

{¶ 22} Here, as in *Whitaker*, the trial court ruled against the plaintiff in the alternative. First, the court concluded that no common law action for wrongful termination for violation of Ohio's public policy favoring workplace safety was recognized. In *Whitaker*, at ¶ 18, we concluded that such an action was available if the elements of a public policy tort are met.

{¶ 23} Alternatively, both in *Whitaker* and here, the trial court analyzed the plaintiff's public policy claim and found that the plaintiff failed to satisfy any of the necessary elements.

{¶ 24} With respect to the "clarity" issue, a plaintiff seeking to establish a workplace safety public policy claim has an obligation to specify the sources of law that support the public policy he or she relies upon in his claim. *Dohme* at ¶ 22.

> [T]o satisfy the clarity element of a claim of wrongful discharge in violation of public policy, a terminated employee must articulate a clear public policy by citation to specific provisions in the federal or state constitution, federal or state statutes, administrative rules and regulations, or common law. A general reference to workplace safety is insufficient to meet the clarity requirement. *Id*. at ¶ 24.

{¶ 25} In his initial complaint, appellant references the federal Energy Reorganization Act of 1974 and the Energy Policy Act of 1992, as amended, as sources of the public policy for nuclear industry workplace safety. He makes no specific assertion of how these enactments apply to him. In his memorandum in opposition to summary judgment, appellant concedes that his reliance on these provisions was undercut by *Leininger v. Pioneer National Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, 875 N.E.2d 36, which held that a public policy wrongful discharge suit could not be sustained when, as in the cited acts, a statute provides remedies in complete relief.

{¶ 26} Appellant references 29 U.S.C. 660(c)(1), a statute governing the Occupational Safety and Health Administration that makes it illegal to terminate an employee for filing an OSHA complaint Appellant fails to allege that he made such a complaint, so the statute is inapplicable to his claim. *Whitaker* at ¶ 22.

{¶ 27} Appellant cites the syllabus of *Pytlinski v. Brocar Prods., Inc.*, 94 Ohio St.3d 77, 760 N.E.2d 385 (2002), for the general rule that Ohio public policy favors workplace safety and *Kulch v. Structural Fibers, Inc.*,78 Ohio St.3d 134, 677 N.E.2d 308 (1997), for the proposition that retaliatory action against an employee precipitates a cause of action. Mere general reference to these cases is insufficient to articulate a clear public policy of workplace safety. *Dohme* at ¶ 21.[1]

{¶ 28} We agree with the trial court; appellant failed to satisfy the clarity element by making specific reference to a state or federal constitution, statute or administrative regulation, or common law provision that is applicable to his discharge from employment. This is sufficient to defeat appellant's claim. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 29} On consideration, the judgment of the Ottawa County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

[1] We note that the dissent in *Whitaker* would have found a source of public policy in Whitaker's reference to R.C. 4101.11 and 4101.12. *Whitaker* at ¶ 51. There is no such reference evident in the record of the present matter.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE