[Cite as *Woods v. Capital Univ.*, 2009-Ohio-5672.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Richard G. Woods,	:	
Plaintiff-Appellant,	:	
		No. 09AP-166
v.	:	(C.P.C. No. 06CVH08-11256)
Capital University et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on October 27, 2009

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

Newhouse, Prophater, Letcher & Moots, LLC, *Wanda L. Carter* and *Christopher E. Hogan*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiff-appellant, Richard G. Woods, appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Capital University ("Capital"), Betty Lovelace, Kevin Sayers, and Denvy Bowman (collectively "appellees"). For the following reasons, we affirm.

{¶2} From 1993 until August 2003, Woods was employed as the Associate Dean of Operations/Director of Public Safety for Susquehanna University ("Susquehanna"), a small college located in Selinsgrove, Pennsylvania. In June 2003, Woods applied and

interviewed for the position of Director of Public Safety and Security at Capital. At that time, Capital's security force consisted of private security guards, but school administrators wanted to institute a professional campus police department staffed with certified police officers. The new Director of Public Safety and Security would be responsible for upgrading the department.

{¶3} Shortly after Woods' interview, Donald Aungst, then Capital's Vice President for Resource Management and Treasurer, called Woods to offer him the job. During that conversation, Woods told Aungst that he could retire from Susquehanna in eight years and he expressed concern about his job security at Capital in light of the friction that might arise as he overhauled Capital's public safety and security department. Aungst replied, "you don't have to worry about that, [ ] you'll have a job * * * for those eight years." Woods deposition, at 23. Reassured by Aungst's promise, Woods accepted the job offer.

{¶4} Before beginning work at Capital, Woods received a letter from Ted Fredrickson, then Capital's President, which stated:

> It is my pleasure to offer you a full-time, term appointment from August 22, 2003 to June 30, 2004, for the title and at the salary set forth below.
>
> You are eligible for participation in all of those programs of the University that apply to full-time, term appointment administrators, including benefits, allowances and professional development activities as described in the Faculty and Administrative Handbook. Your regular duties and responsibilities include participation in the various functions of the University community and your active support of and commitment to the objectives and mission of the University.
>
> To facilitate planning for staffing next academic year, please indicate your written acceptance by returning one copy of this contract and the attached addendum to the Office of Human Resources in Yochum Hall within ten days of your receipt of

> this letter. I hope that you will accept this appointment at Capital University.
>
> Sincerely,
>
> [signature]
>
> Ted Fredrickson, Ph.D.
> President
>
> _____
>
> Appointment: Full-time, Term, Administrative
> Title: Director of Public Safety and Security
> Salary 2003-2004: $65,000
> Prorated: $55,666.70

The letter then provided a place for Woods' signature and the date under the sentence, "I accept this appointment and agree to abide by all applicable policies and procedures of the University."

{¶5} The attached "Addendum to Employment Contract, Provision of University Housing as Condition of Employment" required the Director of Public Safety and Security to reside at a university-owned house located adjacent to Capital. The addendum provided a place for Woods' signature and the date subsequent to the sentence, "I understand and accept these terms of provision of lodging as a condition of employment." Woods signed both the letter and addendum, and he returned them to Capital.

{¶6} In the following year, Woods developed a professional campus police department at Capital. The department consisted of seven police officers, all certified by the Ohio Peace Officer Training Academy. Woods himself, however, never became a certified police officer.

{¶7} In June 2004, Capital expanded Woods' position, naming him Assistant Vice President for Auxiliary Services/Director of Public Safety and Security. Woods

signed a second appointment letter, which offered a full-time appointment from July 1, 2004 to June 30, 2005, thus accepting the new position. With the new position came added responsibilities, including oversight of food services, meeting and event services, and the university bookstore.

{¶8} In June 2005, Woods signed another appointment letter for the Assistant Vice President for Auxiliary Services/Director of Public Safety and Security position. In this third appointment letter, Woods accepted a full-time appointment from July 1, 2005 to June 30, 2006.

{¶9} Sometime in the spring of 2006, Woods began hearing rumors that Capital was facing budgetary problems. In late May 2006, Woods met with Aungst, who was Woods' supervisor, and asked whether he would receive an appointment letter for the 2006/2007 fiscal year. Aungst told Woods, "don't worry, * * * your job is safe." Woods deposition, at 69. However, two or three days later, Aungst "was on his way out." Woods deposition, at 69. Woods then approached Fredrickson with the same concern. Fredrickson assured Woods that he would "have a job next year." Woods deposition, at 69, 120. Four or five days after that conversation, Woods learned that Fredrickson "was going to be gone." Woods deposition, at 121.

{¶10} With Aungst's departure, the administrators who had reported to Aungst lost their supervisor. Bowman, then Capital's Interim President, called a meeting of those administrators and advised them that "for the next three months, given what had transpired with [Aungst's] leaving, [ ] certain areas would be reporting to different people." Woods deposition, at 82. Bowman then informed each administrator who their interim

supervisor would be. Bowman told Woods that Lovelace, Vice President of Student Affairs, would act as his interim supervisor.

{¶11} Unfortunately, the rumors Woods heard were true. In May 2006, the projected deficit for the 2006/2007 fiscal year reached $12.5 million. In response to the looming fiscal shortfall, Bowman created the Position Management Committee ("PMC") and charged it with reviewing all administrative and hourly staff positions, other than the law school positions, for the purpose of recommending positions for elimination. Both Lovelace and Sayers served on the PMC. In carrying out its mission, the PMC recommended the elimination of a position after weighing the following questions:

- Is the position essential to the mission of the institution?
- Is the position critical to the operation of the department/unit?
- Can the position be performed in different ways?
- Is the position strategic in its orientation?
- Is there [ ] any redundancy with other positions?
- Can this position be outsourced?
- How does this position benchmark against comparable institutions?

Sayers affidavit, at ¶2; Stephen D. Bruning affidavit, at ¶4; Lovelace affidavit, at ¶3; Jane Baldwin affidavit, at ¶3.

{¶12} When reviewing Woods' position, the PMC noted that the auxiliary services portion of the position had been recently created. The PMC concluded that the duties related to the auxiliary services part of Woods' job could be reassigned to other administrators, resulting in a streamlining of the administrative functions involved. Turning to the public safety and security side of Woods' position, the PMC decided that, given the small size of the campus police department and the professionalism of its officers, the department did not need a full-time administrator who was not also a certified

police officer. To achieve a more cost-effective and administratively streamlined department, the PMC concluded that the duties associated with the public safety and security portion of Woods' position should be reassigned to one of the existing certified police officers.

{¶13} When the PMC finished its deliberations, Woods' position was one of the 72 positions recommended for elimination. In June 2006, the Executive Committee of the Board of Trustees approved the recommended eliminations. Bowman and Lovelace met with Woods on June 28, 2006 and informed him that Capital was terminating his employment. During this meeting, Bowman handed Woods a letter explaining that a reduction in Capital's work force was the only way to avert the anticipated deficit. In relevant part, the letter stated that Woods' termination was "not a performance-based decision but a financial one." Woods was 54 years old at the time of his discharge.

{¶14} After eliminating Woods' position, Capital redistributed Woods' duties in a manner consistent with the PMC's recommendations. Capital reassigned: (1) oversight of meeting and event services to the Vice President of Institutional Advancement; (2) oversight of food services, custodial services, public safety, and the university bookstore to the Vice President of Student Affairs; (3) oversight of the day-to-day operation of the campus police department to Brian Heaston, who was already a certified police officer with the department. Heaston, age 28 at the time he assumed oversight duties, served as Interim Lead Officer of the department while remaining a uniformed police officer.

{¶15} On August 29, 2006, Woods filed suit against appellees alleging claims for promissory estoppel, age discrimination in violation of R.C. 4112.02(A) and 4112.99, as well as slander and defamation. In addition to appellees, Woods also named Ronald St.

Pierre and Baldwin as defendants. Woods based his slander and defamation claims on a comment allegedly made by Baldwin, then Chairwoman of Capital's Faculty Senate, that Woods was receiving special benefits in housing and golf memberships from Capital. Woods later voluntarily dismissed both St. Pierre and Baldwin.

{¶16} Almost exactly one month after Woods filed suit, an article entitled "Capital University sued for $4.6 million" appeared in the Columbus Dispatch. The article reported the details of Woods' lawsuit and relied extensively upon the statements of Wesley Newhouse, identified in the article as "the attorney for Capital and its administrators." According to the article, Newhouse "said Woods was let go because of Capital's ongoing deficit problems and because of 'job performance issues.' " The next day, the Daily Reporter repeated Newhouse's statement in a short addendum to an article describing a different lawsuit involving Capital.

{¶17} In light of Newhouse's statement, Woods filed an amended complaint that added Newhouse as a defendant and incorporated claims for libel and defamation, as well as a claim for retaliation in violation of R.C. 4112.02(I). Newhouse moved for a Civ.R. 12(B)(6) dismissal, and the remaining defendants bolstered Newhouse with their own motion to dismiss the claims against him. The trial court granted both motions.

{¶18} After conducting discovery, the remaining defendants filed a motion for summary judgment. The trial court also granted that motion, rendering final judgment against Woods on January 21, 2009.

{¶19} Woods now appeals and assigns the following errors:

> [1.] THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS OF SLANDER, LIBEL AND

> DEFAMATION BY CONSTRUING THE EVIDENCE IN FAVOR OF DEFENDANTS.
>
> [2.] THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTIONS TO DISMISS DEFENDANT NEWHOUSE.
>
> [3.] THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM OF RETALIATION BY CONSTRUING THE EVIDENCE IN FAVOR OF DEFENDANTS.
>
> [4.] THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM OF AGE DISCRIMINATION IN THAT THE COURT FAILED TO CONSIDER ALL OF PLAINTIFF'S EVIDENCE THAT HE WAS REPLACED BY A SUBSTANTIALLY YOUNGER EMPLOYEE.
>
> [5.] THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM OF PROMISSORY ESTOPPEL BY CONSTRUING THE EVIDENCE IN FAVOR OF DEFENDANTS.

{¶20} By Woods' first assignment of error, he argues that the trial court erred in granting summary judgment to appellees on his claims for slander, libel, and defamation. As an initial matter, we note that Woods has essentially asserted two defamation claims: one based upon Baldwin's statement that Woods received "free" housing and a "free" golf club membership, and one based upon Newhouse's statement that "job performance issues" motivated Capital's termination of Woods' employment. Woods' first assignment of error ostensibly challenges the grant of summary judgment on both of Woods' defamation claims. However, in his appellate briefs, Woods fails to advance any argument regarding the defamation claim arising from Baldwin's statement.

{¶21} As the party asserting error, Woods bears the burden of affirmatively demonstrating that error. *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-

943, ¶94 (citing App.R. 9 and 16(A)(7) and *State ex rel. Fulton v. Halliday* (1944), 142 Ohio St. 548). The appellant, not the appellate court, must construct the legal arguments necessary to support the appellant's assignments of error. *Bond v. Canal Winchester*, 10th Dist. No. 07AP-556, 2008-Ohio-945, ¶16; *Gold* at ¶94. "Errors not argued in a brief will be regarded as having been abandoned." *Loukinas v. Roto-Rooter Servs. Co.*, 167 Ohio App.3d 559, 2006-Ohio-3172, ¶9.

{¶22} Here, the trial court granted summary judgment on the defamation claim based on Baldwin's statement because it concluded that no reasonable person could find that Baldwin's statement defamed Woods. On appeal, Woods neglects to posit any reason why the trial court erred in its decision. In the absence of such an argument, we need not review the trial court's judgment for any error with regard to that decision.

{¶23} While Woods fails to assert any argument regarding Capital's liability for Baldwin's statement, he forcefully argues that the trial court erred in granting summary judgment on his claim that Newhouse defamed him. We find this argument unavailing.

{¶24} Appellate review of summary judgment motions is de novo. *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548, 2001-Ohio-1607. " 'When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court.' " *Abrams v. Worthington*, 169 Ohio App.3d 94, 2006-Ohio-5516, ¶11 (quoting *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103). Civ.R. 56(C) provides that a trial court must grant summary judgment when the moving party demonstrates that: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) 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. *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶6.

{¶25} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, 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 that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. Id. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. Id. If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. Id.

{¶26} In the case at bar, appellees assert multiple reasons why this court should affirm the grant of summary judgment on Woods' defamation claim. We will focus upon appellees' argument that Woods failed to adduce any evidence that the alleged defamation caused him any damage.

{¶27} Defamation, which includes both slander and libel, is the publication of a false statement " 'made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession.' " *Jackson v.*

Columbus, 117 Ohio St.3d 328, 2008-Ohio-1041, ¶9 (quoting *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7, 1995-Ohio-66). "Slander" refers to spoken defamatory words, while "libel" refers to written or printed defamatory words. *Matikas v. Univ. of Dayton*, 152 Ohio App.3d 514, 2003-Ohio-1852, ¶27.

{¶28} Under Ohio common law, actionable defamation falls into one of two categories: defamation per se or defamation per quod. In order to be actionable per se, the alleged defamatory statement must fit within one of four classes: (1) the words import a charge of an indictable offense involving moral turpitude or infamous punishment; (2) the words impute some offensive or contagious disease calculated to deprive a person of society; (3) the words tend to injure a person in his trade or occupation; and (4) in cases of libel only, the words tend to subject a person to public hatred, ridicule, or contempt. *Schoedler v. Motometer Gauge & Equip. Corp.* (1938), 134 Ohio St. 78, 84 (setting forth the three classes that constitute slander per se); *Bigelow v. Brumley* (1941), 138 Ohio St. 574, 592 (recognizing the last class and holding that "such words are actionable per se if written, though not if spoken orally").

{¶29} Defamation per se occurs if a statement, on its face, is defamatory. *Moore v. P.W. Publishing Co.* (1965), 3 Ohio St.2d 183, 188-89; *Becker v. Toulmin* (1956), 165 Ohio St. 549, 556. On the other hand, a statement is defamatory per quod if it can reasonably have two meanings, one innocent and one defamatory. *Moore* at 189; *Becker* at 556. Therefore, when the words of a statement are not themselves, or per se, defamatory, but they are susceptible to a defamatory meaning, then they are defamatory

per quod. *Moore* at 188; *Becker* at 553-54. Whether an unambiguous statement constitutes defamation per se is a question of law. *Becker* at 555.

{¶30} When a statement is defamatory per se, a plaintiff "may maintain an action for [defamation] and recover damages, without pleading or proving special damages." *Becker* at 553. In other words, in cases of defamation per se, the law presumes the existence of damages. *Wampler v. Higgins*, 93 Ohio St.3d 111, 127, fn. 8, 2001-Ohio-1293 ("[W]ords that are defamatory *per se* normally carry a presumption of * * * damages * * *."); *Gosden v. Louis* (1996), 116 Ohio App.3d 195, 208 ("At common law, once a plaintiff proved that material was defamatory *per se*, he was entitled to recover presumed damages. Proof of the defamation itself established the existence of some damages."). However, when a statement is only defamatory per quod, a plaintiff must plead and prove special damages. *Becker* at 557.

{¶31} Here, Newhouse stated that Capital discharged Woods because of the looming deficit and "job performance issues." Appellees characterize this statement as vague and contend that if it is defamatory at all, it is only defamatory per quod. We disagree. No employer fires an employee for good job performance. The only reasonable reading of Newhouse's statement is that Capital terminated Woods' employment for two reasons, and one of those reasons was Woods' poor job performance. Thus, the statement in and of itself tends to injure Woods in his occupation as any employer would hesitate before hiring a potential employee who underperformed in his previous job. Such a statement is defamatory per se. See, e.g., *Knowles v. Ohio State Univ.*, 10th Dist. No. 02AP-527, 2002-Ohio-6962, ¶25-26 (statement that the plaintiff had been fired from his previous job and lied on his employment application was

defamatory per se); *Dodley v. Budget Car Sales, Inc.* (Apr. 20, 1999), 10th Dist. No. 98AP-530 (statement that the plaintiff was always absent from work was defamatory per se).

{¶32} Because Newhouse's statement is defamatory per se, Ohio common law would allow Woods to recover without pleading or proving damages. However, "[t]he right to sue for damage to one's reputation pursuant to state law is not absolute;" rather, it "is encumbered by the First Amendment to the United States Constitution." *Soke v. Plain Dealer*, 69 Ohio St.3d 395, 397, 1994-Ohio-337.

{¶33} The United States Supreme Court first imposed constitutional limitations on the common law of defamation in *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 84 S.Ct. 710. In that case, the court held that a public official could not recover damages for a defamatory falsehood relating to his official conduct unless he proved "actual malice," i.e., that the statement was made with knowledge that it was false or with reckless disregard of whether it was false. *New York Times*, 376 U.S. at 279-80, 84 S.Ct. at 726. Prior to *New York Times*, the common law presumed malice in cases of defamation per se, thus relieving the plaintiff of any burden to plead or prove fault. *Gosden* at 210 (recognizing that under the common law, "once other elements of a defamation [per se] claim were established, the 'fault' element of malice was presumed," making defamation per se a strict liability tort). In instituting an actual malice proof of fault requirement, the United States Supreme Court sought to prevent the chill on the exercise of free speech that resulted from the common law's strict liability approach to fault. *New York Times*, 376 U.S. at 278, 84 S.Ct. at 725 (holding that the common law, which did not

require a plaintiff to prove fault to recover for libel per se, created a "pall of fear and timidity" under "which the First Amendment freedoms [could not] survive").

{¶34} Three years after deciding *New York Times*, the United States Supreme Court extended the rule articulated in that case to apply to public figures in addition to public officials. *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130, 162-65, 87 S.Ct. 1975, 1995-96 (Warren, C.J., concurring in the result); 388 U.S. at 170, 87 S.Ct. at 1999 (opinion of Black, J.); 388 U.S. at 172, 87 S.Ct. at 2000 (opinion of Brennan, J.). However, in *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 345-46, 94 S.Ct. 2997, 3010, the court refused to require the use of the actual malice standard in suits by private persons alleging defamation on matters of public concern. While the court again recognized that the common law induced self-censorship, it weighed that chilling effect against the states' legitimate interest in compensating individuals for the harm inflicted on them by a defamatory falsehood. *Gertz*, 418 U.S. at 341-48, 94 S.Ct. at 3007-11. The court determined that, unlike public figures, private individuals have not voluntarily exposed themselves to increased risk of injury from defamatory statements and generally lack effective opportunities to rebut such statements. *Gertz*, 418 U.S. at 344-45, 94 S.Ct. at 3009. Based on these two considerations, the court decided to give the states substantial latitude to enforce a legal remedy for defamatory statements regarding a public concern that are injurious to the reputation of a private individual. *Gertz*, 418 U.S. at 345-46, 94 S.Ct. at 3010. The court held that, in such cases, the states could define for themselves an appropriate standard of liability, so long as they did not impose liability without fault. *Gertz*, 418 U.S. at 347, 94 S.Ct. at 3010. Subsequently, Ohio adopted the ordinary negligence standard as the standard of liability for actions involving a private

individual defamed in a statement about a matter of public concern. *Landsdowne v. Beacon Journal Publishing Co.* (1987), 32 Ohio St.3d 176, 180.

{¶35} In addition to requiring an element of fault, the *Gertz* court also limited the type of damages recoverable in defamation cases involving private individuals and statements regarding a matter of public concern. Given the constitutional command of the First Amendment, the court found it "necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." *Gertz*, 418 U.S. at 349, 94 S.Ct. at 3012. In other words, the states could no longer permit recovery of presumed or punitive damages, at least when liability was not based upon a showing of actual malice. *Gertz*, 418 U.S. at 349, 94 S.Ct. at 3011. See also *Gilbert v. WNIR 100 FM* (2001), 142 Ohio App.3d 725, 745 (holding that, under *Gertz*, a plaintiff "must show damages * * * and cannot rely on presumed damages pursuant to defamation *per se*"). Thus, in Ohio, a plaintiff must prove either: (1) ordinary negligence and actual injury, in which case he can receive damages for the actual harm inflicted; or (2) actual malice, in which case he is entitled to presumed damages. See 1 Sack, Defamation (3d ed.2005) 10-12, Section 10.3.4 ("*Gertz* held presumed damages unconstitutional absent 'actual malice,' but confirmed the permissibility even without proof of 'actual malice' of awards of general damages for 'actual injury.' ").

{¶36} Because *Gertz* radically altered a plaintiff's burden to prove damages in cases of defamation per se, we must determine whether it applies here. As we indicated above, *Gertz* applies to cases where private individuals seek a remedy for a defamatory statement regarding a matter of public concern. We thus must first determine whether Woods is a public figure, a limited-purpose public figure, or a private figure. At one

extreme of this continuum sits the public figure, who has achieved "general fame or notoriety in the community" and "pervasive involvement in the affairs of society." *Gertz*, 418 U.S. at 352, 94 S.Ct. at 3013. Located at the middle point of the continuum, the limited-purpose public figure is an individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz*, 418 U.S. at 351, 94 S.Ct. at 3013. Courts generally examine two factors to determine whether a person is a limited-purpose public figure: (1) the person's participation in the controversy from which the alleged defamation arose, and (2) whether that person has attained a general notoriety in the community as a result of that participation. *Cooke v. United Dairy Farmers, Inc.*, 10th Dist. No. 04AP-817, 2005-Ohio-1539, ¶32; *Featherstone v. CM Media, Inc.*, 10th Dist. No. 02AP-65, 2002-Ohio-6747, ¶27. If a person is neither a public figure nor a limited-purpose public figure, then he falls into the private-figure end of the continuum.

{¶37} Here, Woods has nowhere near acquired the universal fame and notoriety associated with public figures. Moreover, we cannot even find sufficient evidence that Woods is a limited-purpose public figure. In the context of the larger controversy—Capital's budget deficit and its measures to rectify that deficit—Woods played only a minor role. Indeed, Woods restricted his public participation in that controversy to the filing of the instant lawsuit. As the United States Supreme Court has recognized:

> [W]hile participants in some litigation may be legitimate "public figures," either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others. There appears little reason why these individuals should substantially forfeit that degree of protection which the

> law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom.

Time, Inc. v. Firestone (1976), 424 U.S. 448, 457, 96 S.Ct. 958, 966-67. Consequently, we conclude that Woods is a private figure.

{¶38} Second, under *Gertz*, we must examine whether the defamatory statement at issue involves a matter of public concern. Courts determine whether a defamatory statement addresses a matter of public concern from the expression's " 'content, form, and context * * * as revealed by the whole record.' " *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985), 472 U.S. 749, 761, 105 S.Ct. 2939, 2946 (quoting *Connick v. Myers* (1983), 461 U.S. 138, 147-48, 103 S.Ct. 1684, 1690). "[P]ublic concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *San Diego v. Roe* (2004), 543 U.S. 77, 83-84, 125 S.Ct. 521, 525-26. In considering the form and context of the alleged defamatory statement, courts consider the medium used to transmit it, and they are more likely to conclude that the statement relates to a matter of public concern if it appears in a widely disseminated publication. *Williams v. Detroit Bd. of Ed.* (C.A.6, 2009), 306 Fed.Appx. 943, 947 (citing *Dun & Bradstreet*, 472 U.S. at 762, 105 S.Ct. at 2947, and *Flamm v. Am. Assn. of Univ. Women* (C.A.2, 2000), 201 F.3d 144, 150). However, the relevant concern need not be of paramount importance or national scope; " 'it is sufficient that the speech concern matters in which even a relatively small segment of the general public might be interested.' " *Levinsky's, Inc. v. Wal-Mart Stores, Inc.* (C.A.1, 1997), 127 F.3d 122, 132 (quoting *Roe v. San Francisco* (C.A.9, 1997), 109 F.3d 578, 585).

{¶39} Here, the statement in question addressed the reasons why Capital discharged a former employee who was seeking $4.6 million in damages for the allegedly

wrongful discharge and events preceding it. The lawsuit itself related to a larger controversy—the deficit and the elimination of 72 positions—of undisputed public interest. See Woods deposition, at 68, 216, 283 (testifying that he read about Capital's budgetary problems in the local newspapers). Moreover, Newhouse's statement was deemed newsworthy enough that two local newspapers included it in their coverage of Capital's ongoing deficit-related woes. Given the high amount of damages sought from an already cash-strapped local university, the connection to a matter of significant public interest, and the region-wide distribution of the statement in two newspapers, we conclude that Newhouse's statement is about a matter of public concern.

{¶40} Because Woods is a private figure and the defamatory speech regarded a matter of public concern, *Gertz* precludes Woods from recovering unless he proved either actual injury or actual malice. First, we will consider whether the record contains any evidence of actual injury. Actual injury encompasses a wide variety of harm, including out-of-pocket loss, impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. *Anderson v. Baker*, 10th Dist. No. 08AP-438, 2008-Ohio-6919, ¶15 (quoting *Gertz*, 418 U.S. at 350, 94 S.Ct. at 3012). Here, Woods asserts that he suffered injury because Newhouse's statement affected his ability to find new employment. After a search of the record, we could only identify the following portion of Woods' deposition as even potential support for this assertion:

> A: I will say that several times when I've done interviews or phone interviews that they've gone extremely well until we get to the point of Capital. And even once you explain the budget deficit, when you're asked who replaced you, and I was honest and told them an officer, the conversation ends.

> Q: Why do you think that is? Do you think they make those assumptions about you must have doing a bad job if they replaced you with an officer –
>
> A: That, and if you Google me, it comes with Mr. Newhouse saying that I was let go for finance and job performance reasons. And there's no way that I'm aware of to get that off the [i]nternet. And so if they think that and Google you, it kind of, in their minds, would reaffirm their thoughts.

Woods deposition, at 168-69. A lost employment opportunity constitutes actual injury. *Patrick v. Cleveland Scene Publishing* (N.D.Ohio 2008), 582 F.Supp.2d 939, 956. Woods' testimony, however, offers only speculation, and not proof, that Newhouse's statement deprived him of an employment opportunity. Such speculation does not satisfy Woods' burden to set forth specific evidence showing that there is a genuine issue of fact as to the existence of actual injury. *McKenzie v. FSF Beacon Hill Assoc., LLC*, 10th Dist. No. 05AP-1194, 2006-Ohio-6894, ¶16 (" 'Mere speculation does not create a material issue of fact.' "); *Carroll v. Alliant Techsystems, Inc.*, 10th Dist. No. 06AP-519, 2006-Ohio-5521, ¶17 ("Speculation and conjecture * * * are not sufficient to overcome appellant's burden of offering specific facts showing that there is a genuine issue for trial.").

{¶41} Second, pursuant to *Gertz*, if Woods offered evidence showing Newhouse acted with actual malice, the law will presume the existence of damages, thus removing the need to prove any damage. As we stated above, "actual malice" is defined as acting with knowledge that the statement is false or acting with reckless disregard as to the statement's truth or falsity. *New York Times*, 376 U.S. at 280, 84 S.Ct. at 726. A person acts with reckless disregard if he: (1) publishes a statement with a "high degree of awareness of [a statement's] probable falsity," *Garrison v. Louisiana* (1964), 379 U.S. 64, 74, 85 S.Ct. 209, 216, or (2) publishes a statement even though he "in fact entertain[s]

serious doubts as to the truth of his publication." *St. Amant v. Thompson* (1968), 390 U.S. 727, 731, 88 S.Ct. 1323, 1325. In the case at bar, Woods failed to introduce any evidence as to what Newhouse, the publisher of the defamatory statement, knew about the reasons behind Woods' discharge at the time he made the statement at issue. Consequently, without any evidence that Newhouse either knew that his statement was false or spoke with reckless disregard to its falsity, we conclude that Woods failed to establish a genuine issue of material fact as to the existence of actual malice.

{¶42} Because Woods failed to adduce evidence creating a genuine issue of material fact as to the existence of actual injury or actual malice, we conclude that the trial court did not err in rendering summary judgment to appellees on Woods' defamation claim. Accordingly, we overrule Woods' first assignment of error.

{¶43} We will next consider Woods' third assignment of error. By that assignment of error, Woods argues that the trial court erred in granting summary judgment to appellees on his retaliation claim. We disagree.

{¶44} R.C. 4112.02(I) prohibits employers from retaliating against any employee who "has opposed any unlawful discriminatory practice defined in [R.C. 4112.02]." The definition of "unlawful discriminatory practice" includes the discharge of an employee without just cause because of his age. R.C. 4112.02(A).

{¶45} In the absence of direct evidence of retaliatory intent, Ohio courts resolve retaliation claims using the evidentiary framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817. *Green-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, ¶13-14. Under that framework, a plaintiff bears the initial burden of establishing a prima facie case of

retaliation. In order to do so, the plaintiff must present evidence that: (1) he engaged in a protected activity, (2) the employer was aware that the plaintiff had engaged in that activity, (3) the employer took an adverse employment action against the plaintiff, and (4) there is a causal connection between the protected activity and adverse action. Id. at ¶13. Once a plaintiff has established a prima facie case, the burden of production shifts to the employer to present evidence of some legitimate, nondiscriminatory reason for its action. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824. If the employer carries this burden, then the plaintiff must demonstrate that the reason the employer offered was not its true reason, but was a pretext for unlawful retaliation. *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 253, 101 S.Ct. 1089, 1093.

{¶46} In the case at bar, Woods asserts that he engaged in a protected activity when he hired legal counsel. Woods contends that Capital became aware of this activity when Woods' counsel sent Bowman a letter, dated August 7, 2006, alleging that Woods had an age discrimination claim against Capital, its officers, and the PMC members. According to Woods, Capital took adverse action against him when Newhouse maligned him in the press.

{¶47} Appellees tacitly concede that Woods has marshaled sufficient evidence to establish the first three elements of a prima facie case of retaliation. Appellees, however, argue that Woods failed to prove a causal connection between the protected activity and adverse action.

{¶48} To establish a causal connection, a plaintiff must produce evidence from which a reasonable finder of fact could infer that the employer would not have taken the adverse action had the plaintiff not engaged in the protected activity. *Motley v. Ohio Civil*

Rights Comm., 10th Dist. No. 07AP-923, 2008-Ohio-2306, ¶17. A plaintiff may satisfy this burden by offering evidence of the employer's knowledge that the plaintiff engaged in protected activity coupled with closeness in time between that knowledge and the adverse action. Id.; *Aycox v. Columbus Bd. of Ed.*, 10th Dist. No. 03AP-1285, 2005-Ohio-69, ¶20. Nevertheless, in most cases, temporal proximity alone will not support a claim for retaliation. *Motley* at ¶17; *Boggs v. Scotts Co.*, 10th Dist. No. 04AP-425, 2005-Ohio-1264, ¶26; *Aycox* at ¶20. The passage of time so dilutes any inference of causation that, without other compelling evidence, a retaliation claim cannot survive. *Motley* at ¶18-20 (holding that the termination of the plaintiff's employment over three years after he filed a grievance failed to establish a causal connection); *Boggs* at ¶26 (holding that the two-month gap between the plaintiff's complaint and discharge did not raise an inference of a causal connection); *Aycox* at ¶21 (noting that "intervals of two to four months between the protected activity and the adverse action are insufficient to show a causal connection").

{¶49} However, where an employer takes adverse action swiftly and immediately after it learns of a protected activity, "such temporal proximity between the events is significant enough to constitute evidence of a causal connection for the purposes of satisfying a prima face case of retaliation." *Mickey v. Zeidler Tool and Die Co.* (C.A.6, 2008), 516 F.3d 516, 525. See also *Clark Cty. School Dist. v. Breeden* (2001), 532 U.S. 268, 273, 121 S.Ct. 1508, 1511 ("The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close.' "). In those rare cases when the discovery of the protected activity and the adverse action occur "within days, or at most, weeks of each

other," temporal proximity can establish a causal connection. *Mobley v. Allstate Ins. Co.* (C.A.7, 2008), 531 F.3d 539, 549. See also *Williams v. Philadelphia Housing Auth. Police Dept.* (C.A.3, 2004), 380 F.3d 751, 760 (concluding that, while the passage of days between the protected activity and the adverse action could prove a causal connection, the lapse of two months required the introduction of additional evidence of causality); *Ningard v. Shin Etsu Silicones*, 9th Dist. No. 24524, 2009-Ohio-3171, ¶17 (holding that mere temporal proximity does not suffice, "especially where the events are separated by more than a few days or weeks").

{¶50} Here, Capital learned of the alleged protected activity on or around August 7, 2006, the date of the letter from Woods' counsel. The purported adverse action occurred on September 27, 2006 when the Columbus Dispatch reported Newhouse's statement that Capital discharged Woods, in part, because of "job performance issues." Because approximately two months elapsed between Capital learning that Woods' had engaged in a protected activity and the adverse action, the temporal proximity is not so close that Woods can rely upon timing alone to establish a causal connection. Woods, however, does not point to any other evidence that would allow a reasonable finder of fact to infer that engaging in the alleged protected activity caused the adverse action. Consequently, Woods failed to create a genuine issue of material fact as to the fourth element of the prima facie case of retaliation.

{¶51} As Woods did not offer evidence establishing all the elements of a prima facie case of retaliation, we conclude that the trial court did not err in granting appellees summary judgment on Woods' retaliation claim. Accordingly, we overrule Woods' third assignment of error.

{¶52} We now turn to Woods' second assignment of error, by which he argues that the trial court erred in dismissing Newhouse from the action. Assuming, without deciding, that the trial court erred when it dismissed Newhouse, we conclude that that error was harmless.

{¶53} "A reviewing court will not disturb a judgment unless the error contained within is materially prejudicial to the complaining party." *Theobald v. Univ. of Cincinnati*, 160 Ohio App.3d 342, 2005-Ohio-1510, ¶17. When avoidance of the error would not have changed the outcome of the proceedings, then the error does not materially prejudice the complaining party. Id. Here, Woods brought claims for libel, defamation, and retaliation against Newhouse based upon Newhouse's statement that "job performance issues" played a role in Woods' discharge. Woods asserted that liability attached to Capital, as well as Newhouse, because Newhouse acted as Capital's agent while committing the alleged torts. Capital, the only defendant left facing the relevant claims after Newhouse's dismissal, moved for and received summary judgment on those claims. If Newhouse had stayed a party to the case, he, too, would have received summary judgment in his favor. Consequently, even if the trial court had not committed the alleged error, the outcome—judgment against Woods on his claims for libel, defamation, and retaliation—would remain the same. Newhouse's early exit from the case, therefore, did not materially prejudice Woods. Accordingly, we overrule Woods' second assignment of error.

{¶54} By Woods' fourth assignment of error, he argues that the trial court erred in granting appellees summary judgment on his age discrimination claim because the court

did not first consider evidence that a substantially younger employee replaced him. We disagree.

{¶55} Under Ohio law, absent direct evidence of age discrimination, a plaintiff can establish a prima facie case of age discrimination in an employment discharge action by demonstrating that he or she: "(1) was a member of the statutorily protected class, (2) was discharged, (3) was qualified for the position, and (4) was replaced by, or the discharge permitted the retention of, a person of substantially younger age." *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, paragraph one of the syllabus. If a plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for its discharge of the plaintiff. *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093. Should the employer carry this burden, the plaintiff must then prove that the reasons the employer offered were not its true reasons, but merely a pretext for discrimination. Id.

{¶56} When a discharge results from a work force reduction, an employee is not replaced, instead his position is eliminated. *Barnes v. GenCorp Inc.* (C.A.6, 1990), 896 F.2d 1457, 1465. Logically, then, a plaintiff discharged as part of a work force reduction cannot offer evidence that he was replaced by a substantially younger person to satisfy the fourth element of the prima facie case. Moreover, even if such a plaintiff demonstrates that his discharge permitted the retention of substantially younger persons, no inference of discriminatory intent can be drawn. Id. In the context of a work force reduction, the discharge of the plaintiff and retention of a substantially younger employee is not "inherently suspicious" because a work force reduction invariably entails the discharge of some older employees and the retention of some younger employees.

Brocklehurst v. PPG Industries, Inc. (C.A.6, 1997), 123 F.3d 890, 896. Permitting an inference of intentional discrimination to arise from the retention of younger employees "would allow every person age 40-and-over to establish a prima facie case of age discrimination if he or she was discharged as part of a work force reduction." *Barnes* at 1465.

{¶57} Consequently, when a plaintiff's position is eliminated as part of a work force reduction, courts modify the fourth element of the prima facie case to require the plaintiff to " 'com[e] forward with additional evidence, be it direct, circumstantial, or statistical, to establish that age was a factor in the termination.' " *Kundtz v. AT & T Solutions, Inc.*, 10th Dist. No. 05AP-1045, 2007-Ohio-1462, ¶21 (quoting *Dahl v. Battelle Memorial Inst.*, 10th Dist. No. 03AP-1028, 2004-Ohio-3884, ¶15). See also *Hunt v. Trumbull Community Action Program*, 11th Dist. No. 2005-T-0036, 2006-Ohio-1698, ¶27; *Johnson v. Central State Univ.* (Mar. 7, 2000), 10th Dist. No. 99AP-507. The purpose of this modified requirement is to ensure that, in work force reduction cases, the plaintiff has presented evidence to show that there is a chance that the work force reduction is not the reason for the termination. *Asmo v. Keane, Inc.* (C.A.6, 2006), 471 F.3d 588, 593; *Lovas v. Huntington Natl. Bank* (C.A.6, 2000), 215 F.3d 1326, fn. 1 (table).

{¶58} Of course, before applying the modified fourth element in a particular case, a court must ensure that the discharge actually resulted from a work force reduction. In determining whether a valid work force reduction occurred, the key inquiry is whether or not the employer replaced the plaintiff. *Wilson v. Ohio* (C.A.6, 2006), 178 Fed.Appx. 457, 465; *Godfredson v. Hess & Clark, Inc.* (C.A.6, 1999), 173 F.3d 365, 372. As the *Barnes* court held:

> An employee is not eliminated as part of a work force reduction when he or she is replaced after his or her discharge. However, a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. A person is replaced only when another employee is hired or reassigned to perform the plaintiff's duties.

Id. at 1465. Therefore, if an employer did not replace the plaintiff, but rather consolidated jobs in order to eliminate excess worker capacity, then a work force reduction took place. *Spencer v. Hilti, Inc.* (C.A.6, 1997), 116 F.3d 1480 (table).

{¶59} In the case at bar, Woods asserts that Heaston, then a 28-year-old campus police officer, replaced him. The evidence, however, does not support this assertion. After Capital discharged Woods, it redistributed Woods' duties to three different existing employees—the Vice President of Institutional Advancement, the Vice President of Student Affairs, and Heaston. " 'Spreading the former duties of a terminated employee among the remaining employees does not constitute replacement.' " *Mazzitti v. Garden City Group, Inc.*, 10th Dist. No. 06AP-850, 2007-Ohio-3285, ¶20 (quoting *Lilley v. BTM Corp.* (C.A.6, 1992), 958 F.2d 746, 752). Capital, therefore, did not replace Woods.

{¶60} In his argument to the contrary, Woods ignores the auxiliary services portion of his job and focuses exclusively upon the disposition of his public safety and security duties. Woods contends that he was replaced because Heaston assumed all of his former public safety and security duties. An employer cannot avoid liability "by changing the job title or by making minor changes to a job." *Barnes* at 1465, fn. 10. See also *Hamilton v. SYSCO Food Servs. of Cleveland, Inc.*, 170 Ohio App.3d 203, 2006-Ohio-6419, ¶41. Making cosmetic changes to a position before assigning it to another employee is tantamount to replacement. *Liggins v. Am. Elec. Power Co.* (Nov. 14, 2007),

S.D.Ohio No. C2-04-502. Here, however, the changes to Woods' former position surpassed the minor, cosmetic changes that signal that a replacement actually occurred. Although Heaston assumed all of Woods' public safety and security duties, those duties only amounted to 60 percent of the total duties associated with Woods' former position. True, 60 percent is not insignificant, but by assigning 40 percent of Woods' duties to other employees, Capital made more than minor or cosmetic changes to Woods' former position. Moreover, unlike Woods' former position, Heaston's role as Interim Lead Officer included the requirement that Heaston continue to work as a certified police officer. Thus, Heaston did not merely step into Woods' former position; instead, he undertook a new, different position.

{¶61} Because Capital eliminated Woods' position as part of a work force reduction, Woods had to produce additional evidence to establish that age was a factor in his discharge. Woods contends that he provided that evidence by demonstrating that Capital had a continuing need for his skills and services in that his various duties were still being performed. We do not find this evidence indicative of age discrimination. As *Barnes* recognized, after a work force reduction, the duties associated with an eliminated position often continue to be performed, just by less people than before. Thus, the fact that remaining employees carry out a plaintiff's former duties attests to the existence of a work force reduction, not the presence of discriminatory intent.

{¶62} Without any evidence to satisfy the fourth element of the prima facie case, Woods cannot prove age discrimination. Accordingly, we conclude that the trial court did not err in granting appellees summary judgment on that claim, and we overrule Woods' fourth assignment of error.

{¶63} By Woods' fifth assignment of error, he argues that the trial court erred in granting appellees summary judgment on his claim for promissory estoppel. We disagree.

{¶64} Promissory estoppel provides an equitable remedy for a breach of an oral promise, absent a signed agreement. *Olympic Holding Co. v. ACE Ltd.*, 122 Ohio St.3d 89, 2009-Ohio-2057, ¶40. In order to succeed on a claim for promissory estoppel:

> "The party claiming the estoppel must have relied on conduct of an adversary in such a manner as to change his position for the worse and that reliance must have been reasonable in that the party claiming estoppel did not know and could not have known that its adversary's conduct was misleading."

Id. at ¶39 (quoting *Shampton v. Springboro*, 98 Ohio St.3d 457, 2003-Ohio-1913, ¶34, which quoted *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 145). The elements necessary to prove a claim for promissory estoppel are: (1) a clear, unambiguous promise, (2) the person to whom the promise is made relies on the promise, (3) reliance on the promise is reasonable and foreseeable, and (4) the person claiming reliance is injured as a result of reliance on the promise. *Pappas v. Ippolito*, 177 Ohio App.3d 625, 2008-Ohio-3976, ¶55.

{¶65} In the case at bar, Woods claims that he reasonably and detrimentally relied upon three different promises made by Capital administrators. The first promise that Woods allegedly relied upon was Aungst's promise that Woods would have a job for eight years. Shortly after Aungst made that promise, Woods signed an appointment letter that specified that his period of employment would begin on August 22, 2003 and end on June 30, 2004. Appellees argue that this appointment letter constitutes a contract, and

thus, the parol evidence rule bars the admission of evidence of Aungst's oral promise because it contradicts the terms of the contract.

{¶66} The parol evidence rule is a substantive rule of law developed centuries ago to protect the integrity of written contracts. *Ed Schory & Sons, Inc. v. Francis*, 75 Ohio St.3d 433, 440, 1996-Ohio-194; *Charles A. Burton, Inc. v. Durkee* (1952), 158 Ohio St. 313, paragraph one of the syllabus. According to this rule, " 'a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing.' " *Bellman v. Am. Internatl. Group*, 113 Ohio St.3d 323, 2007-Ohio-2071, ¶7 (quoting Black's Law Dictionary (8th ed. 2004)). By prohibiting the introduction of extrinsic evidence to alter or supplement the parties' final, complete expression of their agreement, the parol evidence rule ensures the stability, predictability, and enforceability of written contracts and " 'effectuates a presumption that a subsequent written contract is of a higher nature than earlier statements, negotiations, or oral agreements * * *.' " *Galmish v. Cicchini*, 90 Ohio St.3d 22, 27, 2000-Ohio-7 (quoting 11 Williston on Contracts 541-48 (4th ed.1999), Section 33:1).

{¶67} Pursuant to the parol evidence rule, courts cannot enforce an oral promise in preference to a signed writing that pertains to exactly the same subject matter, but has different terms. *Ed Schory & Sons* at 440. Thus, "[p]romissory estoppel does not apply to oral statements made prior to the written contract, where the contract covers the same subject matter." *Borowski v. State Chem. Mfg. Co.* (1994), 97 Ohio App.3d 635, 643. See also *Ed Schory & Sons* at 439-40 (barring a claim for promissory estoppel when the alleged oral promise differed from the terms of the written contract); *Cuthbert v.*

Trucklease Corp., 10th Dist. No. 03AP-662, 2004-Ohio-4417, ¶30 (concluding that when there is "an unambiguous, written agreement purporting to delineate the obligations of both parties[,] * * * such agreement precludes the use of promissory estoppel to add any oral terms"); *Marbury v. Central State Univ.* (Dec. 14, 2000), 10th Dist. No. 00AP-597 (holding that the plaintiff could not, "by means of introducing parol evidence, invoke the doctrine of promissory estoppel to alter the unambiguous terms of an agreement"); *Lippert v. Univ. of Cincinnati* (Oct. 3, 1996), 10th Dist. No. 96AP-349 ("[W]here a written contract is properly determined to be unambiguous, the trial court does not err in entering summary judgment, barring the promissory estoppel claim.").

{¶68} In *Kashif v. Central State Univ.* (1999), 133 Ohio App.3d 678, we applied the foregoing rule to facts very similar to the case at hand. There, the plaintiff claimed that the Chairman of Central State University's Department of Education orally promised her that she would have a job for at least three years. After receiving the promise for three years of employment, the plaintiff signed a written contract that specified that the term of her employment would begin on October 1, 1994 and would end on July 31, 1995. In addressing the plaintiff's claim for promissory estoppel based upon the oral promise, this court stated:

> Plaintiff now seeks to show that an oral agreement was entered into prior to the written 1994 contract that would clearly alter the terms of the contract, *i.e.*, plaintiff seeks to prove that, based on the oral agreement, she was given a three-year position as an associate on a tenure track. However, the promise of a three-year, tenure-track position is clearly at variance with or contradictory to the written contract. We conclude that the trial court properly applied the parol evidence rule to exclude evidence of prior collateral agreements.

Id. at 683. We went on to hold that, "where [a] plaintiff [is] employed for a definite term according to a written agreement, [the] plaintiff cannot invoke the doctrine of promissory estoppel on the basis of alleged promises that contradict that written contract." Id. at 684.

{¶69} In the case at bar, after Aungst made the oral promise at issue, Woods signed the appointment letter, thus entering into an employment contract. The unambiguous terms of that employment contract directly contradicted Aungst's oral promise. Instead of providing Woods with the promised eight years of employment, the contract set the duration of Woods' employment at approximately ten months. Because Aungst's oral promise and the unambiguous, written contract are contradictory, Woods cannot now use the oral promise as a basis for his promissory estoppel claim.

{¶70} Woods, however, argues that the appointment letter is not a contract. " 'Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.' " *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶16 (quoting *Perlmuter Printing Co. v. Strome, Inc.* (N.D.Ohio 1976), 436 F.Supp. 409, 414). Woods fails to identify which of these essential elements is lacking from the appointment letter, and we are also at a loss to name the missing element. In the appointment letter, Capital "offer[ed] [Woods] a full-time, term appointment from August 22, 2003 to June 30, 2004" and Woods "accept[ed] this appointment." Woods agreed to work as the Director of Public Safety and Security in exchange for a salary of $55,666.70 for the ten-month period. Finally, both Capital's President and Woods signed the appointment letter, thus signaling the parties' mutual assent to the agreement.

{¶71} Woods' sole evidence to support his contention that the appointment letter is not a contract consists of his own testimony that, "[t]he appointment letters I received each year were merely an acknowledgement of position and salary for the upcoming year." Woods affidavit, at ¶6. Whether or not a contract exists is a question of law. *Motorists Mut. Ins. Co. v. Columbus Finance, Inc.*, 168 Ohio App.3d 691, 2006-Ohio-5090, ¶7. Lay witnesses, such as Woods, may only testify as to their personal knowledge, i.e., " '[k]nowledge gained through firsthand observation or experience * * *.' " *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, ¶26 (quoting Black's Law Dictionary (7th ed.1999)). Questions of law are outside of the realm of firsthand knowledge, and thus, a lay witness may not offer legal conclusions. Consequently, we need not consider Woods' opinion that the appointment letters constituted mere acknowledgments and not contracts.

{¶72} In addition to Aungst's promise, Woods rests his claim for promissory estoppel on Fredrickson's promise that Capital would employ Woods during the 2006/2007 fiscal year. Woods also points to Bowman's supposed promise, made in early June 2006, that Capital would continue to employ him for the succeeding three months. Appellees, however, contend that Woods cannot recover based upon these promises because he cannot prove either reasonable or detrimental reliance. We agree.

{¶73} Generally, whether a party has made, kept, or relied upon an alleged promise presents a factual question. *Mansfield Square, Ltd. v. Big Lots, Inc.*, 10th Dist. No. 08AP-387, 2008-Ohio-6422, ¶16. Nevertheless, courts may deem certain circumstances objectively unreasonable. Id. Here, both of the alleged promises arose out of a time of great upheaval at Capital due to the anticipated fiscal deficit. As Woods

testified, days after Aungst told Woods that his job was safe, Aungst lost his own job. Although Fredrickson essentially repeated Aungst's assurances, Fredrickson, too, left Capital only days after making his alleged promise to Woods. Bowman soon thereafter purportedly promised Woods three months of employment, but he made that promise in the midst of planning cost-cutting measures that included job eliminations. Given these circumstances, a reasonable person could only conclude that Woods could not reasonably rely upon the promises at issue.

{¶74} Moreover, Woods failed to show how he relied upon the promises to his detriment. A plaintiff's detrimental reliance on a promise must be "of a sufficiently definite and substantial nature so that injustice will result if the 'promise' is not enforced." *Talley v. Teamsters, Chauffeurs, Warehousemen, and Helpers, Local No. 377* (1976), 48 Ohio St.2d 142, 146. Here, if anything, the evidence demonstrates that Woods avoided any detrimental reliance by beginning his job search almost immediately after receiving the promises at issue. According to Woods, Fredrickson and Bowman made their promises to him in late May and/or early June 2006. Woods submitted a résumé to another employer on June 13, 2006.

{¶75} In sum, none of the three alleged promises can support a claim for promissory estoppel. Accordingly, we conclude that the trial court did not err in granting summary judgment to appellees on that claim, and we overrule Woods' fifth assignment of error.

{¶76} For the foregoing reasons, we overrule Woods' five assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH, P.J., & BROWN, J., concur.