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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

BRADLEY CIBIK
Plaintiff

KMART CORP. ETAL
Defendant

Case No: CV-08-680015

Judge: BRENDAN J SHEEHAN

JOURNAL ENTRY

OPINION AND JUDGMENT ENTRY. O.S.J.

Judge Signature Date

10/21/2009

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

BRADLEY CIBIK,	)	CASE NO. CV 08 680015
	)	
Plaintiff,	)	JUDGE BRENDAN J. SHEEHAN
	)	
v.	)	
	)	
KMART CORPORATION.,	)	**OPINION AND JUDGMENT**
	)	**ENTRY**
Defendant.	)	

I. Issue Presented.

This matter is before the Court on Defendant Kmart Corporation's ("Kmart's") Motion for Summary Judgment.

Plaintiff Bradley Cibik ("Cibik") was a pharmacist employed, then terminated, by Kmart. Cibik alleges that his termination was in violation of public policy as a termination for reporting Kmart's alleged criminal violations (Count I), in violation of public policy protecting consultations with counsel (Count II) and in violation of Ohio's Whistleblower Statute, R.C. §4113.52.

The parties have fully briefed the issues raised in Defendant's Motion for Summary Judgment.

II. Standard for Summary Judgment

Under Civ.R. 56, summary judgment is appropriate when, (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can only reach one conclusion which is adverse to the non-moving party. *Holliman v. Allstate Ins. Co.* (1999), 86 Ohio St.3d 414; *Temple v. Wean United, Inc.* (1997), 50

Ohio St.2d 317, 327. When a motion for summary judgment is properly made and supported, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial and may not merely rest on allegations or denials in the pleadings. *Dresher v. Burt* (1996), 75 Ohio St.3d 280. The nonmoving party must produce evidence on any issue for which that party bears the burden of production at trial. *Wing v. Anchor Media, Ltd.* (1991), 59 Ohio St.3d 108, 111. Further, to survive summary judgment, a plaintiff must produce more than a scintilla of evidence in support of her position. *Markle v. Cement Transit Co., Inc.* (1997), 1997 WL 578940, 2, citing *Redd v. Springfield Twp. School District* (1993), 91 Ohio App.3d 88, 92.

III. Count III—Plaintiff's Claim Under Ohio's Whistleblower Statute

Plaintiff asserts that his termination was in retaliation for his reporting violations of law related to an alleged reduction of insurance co-payments on prescriptions, non-pharmacist control of the pharmacy and improper dispensing of prescription medication.

Ohio's Whistleblower Statute provides:

> (A)(1)(a) If an employee becomes aware in the course of the employee's employment of a violation of any state or federal statute or any ordinance or regulation of a political subdivision that the employee's employer has authority to correct, and the employee reasonably believes that the violation is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety, a felony, or an improper solicitation for a contribution, the employee orally shall notify the employee's supervisor or other responsible officer of the employee's employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation. If the employer does not correct the violation or make a reasonable and good faith effort to correct the violation within twenty-four hours after the oral notification or the receipt of the report, whichever is earlier, the employee may file a written report that provides sufficient detail to identify and describe the violation with the prosecuting authority of the county or municipal corporation where the violation occurred, with a peace officer, with the inspector

> general if the violation is within the inspector general's jurisdiction, or with any other appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which the employer is engaged.
>
> (b) If an employee makes a report under division (A)(1)(a) of this section, the employer, within twenty-four hours after the oral notification was made or the report was received or by the close of business on the next regular business day following the day on which the oral notification was made or the report was received, whichever is later, shall notify the employee, in writing, of any effort of the employer to correct the alleged violation or hazard or of the absence of the alleged violation or hazard.

R.C. § 4113.52 .

"In order for an employee to be afforded protection as a 'whistleblower,' such employee must strictly comply with the dictates of R.C. 4113.52. Failure to do so prevents the employee from claiming the protections embodied in the statute." *Contreras v. Ferro Corp.* (1995), 73 Ohio St.3d 244, syllabus. See also *Arsham-Brenner v. Grande Point Health Care Community* (2000) 2000 WL 968790, 3; *Davidson v. BP Am.* (1997), 125 Ohio App. 3d 643, 654-55 (summary judgment appropriate when employee failed to provide written, detailed identification of violation as required by statute); *Haney v. Chrysler Corp.* (1997), 121 Ohio App.3d 137 (summary judgment affirmed for failure to provide detailed written notice to same supervisor given oral notice of alleged violations). Thus, Cibik must have reported violations to his supervisor orally, followed by written notification in sufficient detail to identify and describe the violation to the same supervisor.

The fact that Cibik lodged numerous complaints with numerous supervisors is undisputed. However, Kmart asserts that Cibik failed to follow a verbal report of an alleged violation with a written report of the same alleged violation to the same supervisor. In response, Cibik alludes generally to conversations he had with numerous individuals but did not direct the

Court to any chain of communication that contained consistent complaints made to the same supervisor. Accordingly, the Court has independently reviewed the copious documents submitted to discern the types of complaints Cibik made during the relevant time period.

A written report of alleged violations is contained in an email from Cibik to Clay Uber, the regional supervisor, dated October 11, 2003 in which Cibik complains that the investigation of his complaints to other Kmart personnel was insufficient. Cibik does not mention any safety concerns or violations of law, merely his dissatisfaction with the workplace environment. However, it is undisputed that Cibik discussed the email with Uber some time between October 11 and October 17, 2003. While it is clear that this conversation concerned Cibik's clashes with the store manager as identified in his complaint to Marshall as he sought a full investigation into his "harassment" allegations asserted in the September 26, 2003 letter, the record is not clear concerning the exact conversation that occurred.

The final written report is dated October 22, 2003 and is addressed to Uber once again. It recounts a meeting Cibik had on October 17, 2003 with Marshall, Bill Cvengros, the store district manager, and Jean Webb. The October 22, 2003 report reiterates many of the earlier complaints concerning the store manager's conduct toward Cibik and asserts that Kmart practices may violate R.C. §§4729.27 (pharmacy control) and 4729.55 (reduction of insurance co-pays through cash cards), as well as OAC 4729-5-30 (dispensing prescription medication).

Because issues of material fact remain concerning whether Cibik verbally notified Uber of his complaints prior to the October 22, 2003 report, Defendant's Motion for Summary Judgment as to Count III of Plaintiff's Complaint is **DENIED.**

IV. Counts I and II—Plaintiff's *Greeley* Claims

In Ohio, absent an employment contract, the employer-employee relationship is considered at-will meaning that an employer may terminate an employee for any lawful reason and an employee may leave the relationship for any reason. *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228, 228. However, an exception to the traditional at-will employment rule exists where an employee is terminated in violation of public policy. *Id.*

To succeed on a *Greeley* claim of wrongful termination in violation of public policy, a plaintiff must satisfy the following elements: (1) a clear public policy existed as manifested in the federal or state constitution, statute, administrative regulation, or common law; (2) terminating employees under circumstances such as those involved in the plaintiff's termination would jeopardize the public policy; (3) plaintiff's dismissal was motivated by conduct related to the public policy; and (4) the employer lacked overriding legitimate business justification for the dismissal. *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 69-70. The first two prongs are questions of law for the court while the latter two prongs are questions for the trier of fact. *Id.*

Count I of Cibik's Complaint alleges that he was wrongfully terminated "because he had reported Defendants' conduct, which he believed violated Ohio law, to his direct and regional managers". Count II of Cibik's Complaint alleges he was wrongfully terminated "because he intended to consult and had consulted an attorney, and/or because they believed he intended to and had consulted an attorney."

Addressing Count I first, the Eighth District Court of Appeals cogently addressed claims similar to Cibik's current claim:

> The Supreme Court, in *Kulch,* stated, 78 Ohio St.3d at 153, 677 N.E.2d at 322-323:

> However, the public policy embodied in the Whistleblower Statute is limited. By imposing strict and detailed requirements on certain whistleblowers and restricting the statute's applicability to a narrow set of circumstances, the legislature clearly intended to encourage whistleblowing *only to the extent that the employee complies with the dictates of R.C. 4113.52.* As we held in *Contreras, supra,* 73 Ohio St.3d 244, 652 N.E.2d 940, syllabus: 'In order for an employee to be afforded protection as a "whistleblower," such employee must strictly comply with the dictates of R.C. 4113.52. Failure to do so prevents the employee from claiming the protections embodied in the statute.' " (Emphasis *sic.*)
>
> Consequently, appellant, here, is limited to bringing his claim for tortious wrongful discharge in violation of public policy pursuant to the requirements of the Whistleblower Act. "The obvious implication of *Contreras* is that an employee who fails to strictly comply with the requirements of R.C. 4113.52 cannot base a *Greeley* claim solely upon the public policy embodied in that statute." *Kulch, supra,* 78 Ohio st.3d at 153, 677 N.E.2d at 323.

Davidson v. BP Am., Inc. (1997), 125 Ohio App.3d 643, 650-651.

Because Count I is essentially duplicative of Count III, Defendant's Motion for Summary Judgment must be **DENIED**. Plaintiff is cautioned, however, that the duplicative claim cannot be allowed to seek duplicate recovery at trial.

The evidence submitted to the Court concerning Count II, when viewed in a light most favorable to Cibik, indicates that he advised Kmart representatives that he wanted to review certain documents with counsel and that he was terminated shortly thereafter.

Whether an employer's discharge of an employee for consulting with or seeking to consult with an attorney violates public policy appears to be an issue of first impression in the Eighth Appellate District. As such the Court relies on the analysis and holdings throughout the State, with particular emphasis on the following:

> We note that at least one federal court has held that an employer's discharge of an employee for consulting a lawyer constitutes a violation of public policy. *Thompto v. Coborn's Inc.* (N.D.Iowa 1994), 871 F.Supp. 1097. In *Thompto,* the court found a violation of public policy based upon a number of factors, including: legislative recognition of the power of the state judiciary to regulate the legal profession, including the power to admit persons to practice and to revoke a person's license to practice; the fact that lawyers, as guardians of the law, play an important role in the preservation of society; the adoption by the Iowa Supreme Court of the Code of Professional Responsibility, which articulates the public policy that citizens of the state are entitled to access to professional legal services; the fact that attorneys are the key to obtaining relief from violations of individual and group rights in the employment context; and the fact that Congress has recognized the importance of consultation and employment of legal counsel to vindicate civil rights through federal statutory provisions awarding attorney fees for parties who are successful in vindicating those rights at trial. The *Thompto* court further held that "[e]ven if the authorities cited above in support of the public policy did not exist, the court concludes that a consultation with a lawyer is so fundamental to our system of justice that an employer's discharge of an employee for consulting a lawyer would violate public policy." *Id.* at 1121.
>
> We find persuasive the *Thompto* court's reasoning, and we conclude that the act of firing an employee for consulting an attorney could serve as the basis for a public policy exception to the common-law employment-at-will doctrine. We make no determination regarding the merits of plaintiff's claim; rather, genuine issues of fact remain concerning whether plaintiff was actually discharged for consulting with an attorney. Accordingly, summary judgment was improper on plaintiff's claim for violation of public policy.

Simonelli v. Anderson Concrete Co. (1994), 99 Ohio App.3d 254, 259.

The Court finds that genuine issues of fact remain as to whether Cibik's dismissal was motivated by conduct related to the public policy and whether Kmart lacked overriding legitimate business justification for his dismissal. Accordingly, Defendant's Motion for Summary Judgment on Count II of Plaintiff's Complaint is **DENIED.**

JUDGE BRENDAN J. SHEEHAN

Dated: 10-19-09

RECEIVED FOR FILING

OCT 22 2009

GERALD E. FUERST, CLERK
By Deputy

CERTIFICATE OF SERVICE

A copy of the foregoing was served by mail and facsimile to the following this 21st day of October, 2009.

Christopher P. Thorman
Mark Griffin
Thorman & Hardin-Levine Co., L.P.A.
The Bradley Building
1220 West 6th Street, Suite 207
Cleveland, OH 44113
Fax: (216) 621-3422

Nancy M. Barnes
Sarah Flannery
Thompson Hine LLP
3900 Key Center
127 Public Square
Cleveland, OH 44114
Fax: (216) 566-5800