IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ADAM KASTLER, Plaintiff, v. CARRABBA'S ITALIAN GRILL, INC., *et al.*, Defendants.	)	CASE NO. CV 11 767002 JUDGE BRENDAN J. SHEEHAN **OPINION AND JUDGMENT ENTRY**

I. ISSUES PRESENTED.

This matter is before the Court on Defendants' Motion to Dismiss Counts IV and V of Plaintiff Adam Kastler's Complaint.

Plaintiff was employed at a Carrabba's Italian Grill restaurant ("Carrabba's") in Westlake, Ohio. Defendant Michael Sopko was Plaintiff's manager at Carrabba's.

Plaintiff alleges that on or around June 12, 2011, Defendant Sopko interviewed several employees concerning complaints about sexual harassment against female servers by the restaurant's general manager. Plaintiff states that he participated in the interview and, several days later, was asked to meet with Sopko again. At the second meeting, Plaintiff alleges that Defendant Sopko terminated Plaintiff's employment, "berated Kastler with allegations and insults including that he lied about [the general manager] and that he 'needed professional help'". Plaintiff maintains that he was later advised by Carrabba's human resource department that "he had been terminated for unprofessional conduct regarding an inappropriate joke."

Based upon these allegations, Plaintiff filed a five count Complaint for (1) gender discrimination under R.C.4112.02, (2) wrongful termination based on gender discrimination, (3)

retaliatory wrongful termination, (4) wrongful termination in violation of public policy, and (5) intentional infliction of emotional distress. Plaintiff named Sopko, Carrabba's Italian Grill, Inc., and a related entity, OSI Restaurant Partners, LLC as defendants to this action.

Defendants collectively filed a Motion to Dismiss pursuant to Civ.R.12(B)(6) as to Counts IV and V of the Complaint.

II. LAW AND ANALYSIS

A. Standard for Civ.R. 12(B)(6) Motions.

A motion to dismiss brought pursuant to Civ.R. 12(B)(6) should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *O'Brien v. University Community Tenants Union, Inc.*, 42 Ohio St. 2d 242, 327 N.E.2d 753 (1975) *quoting Conley v. Gibson*, 355 U.S. 41, 45, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). All factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). Further, the court is confined to the allegations of the complaint. *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 144, 573 N.E.2d 1063 (1991); *AAA American Const., Inc. v. Alpha Graphic*, 8th Dist. No. 84320, 2005 - Ohio- 2822.

"While a complaint attacked by a * * * motion to dismiss does not need detailed factual allegations, the [plaintiffs'] obligation to provide the grounds for their entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Parsons v. Greater Cleveland Regional Transit Auth.*, 8th Dist. No. 93523, 2010 -Ohio- 266 at ¶ 11, citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct.

1955, 167 L.Ed.2d 929 (2007). Conclusory statements in a complaint not supported by facts are not afforded the presumption of veracity and are insufficient to withstand a motion to dismiss. *Id.; Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 193, 532 N.E.2d 753 (1988). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations" to survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

B. Plaintiff's Claim for Wrongful Termination Against Public Policy.

Employment relationships in Ohio are generally at will: an employer may terminate an employee with or without cause and the termination does not give rise to an action for damages. *Collins v. Rizkana*, 73 Ohio St.3d 65, 67, 652 N.E.2d 653 (1995); *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 483 N.E.2d 150 (1985), paragraph 1 of the syllabus. However, an exception to this general rule exists 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. *Painter v. Graley*, 70 Ohio St.3d 377, 639 N.E.2d 51 (1994) paragraph three of the syllabus; *Greeley v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990) paragraph one of the syllabus.

To maintain a cause of action for wrongful discharge in violation of public policy, a plaintiff must establish:

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); and,

4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).

Painter, 70 Ohio St.3d at 384, 639 N.E.2d 51, 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.

The clarity and jeopardy elements are issues of law for the court's determination; the causation and overriding-justification elements are questions for determination by the fact-finder. *Collins*, 73 Ohio St.3d at 70, 652 N.E.2d 653.

To satisfy the clarity element, a plaintiff 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." *Dohme v. Eurand Am., Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, 956 N.E.2d 825, ¶24.

As concisely stated in *Dohme*, "[u]nless the plaintiff asserts a public policy and identifies federal or state constitutional provisions, statutes, regulations, or common law that support the policy, a court may not presume to sua sponte identify the source of that policy. There may be valid reasons for a plaintiff's failure to identify and assert a specific public policy or a specific source for that public policy. An appellate court may not fill in the blanks on its own motion." *Id.* at ¶23.

Further, claims of termination in violation of public policy are precluded when the source of public policy provides an adequate remedy at law. *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 244, 773 N.E.2d 526 (2002).

Plaintiff has only cited to R.C. 4112.02 as the basis for his claims. If Plaintiff intended to rely on another source of public policy, then he failed to adequately plead his claim pursuant to the holding in *Dohme*. If Plaintiff is relying on R.C. 4112.02 as the source of public policy, then his public policy claim is precluded because the statute provides an adequate remedy. Accordingly, Defendants' Motion to Dismiss Count IV of Plaintiff's Complaint is well taken.

C. Plaintiff's Claim for Intentional Infliction of Emotional Distress.

Count V of Plaintiff's Complaint seeks damages arising from Defendants' alleged intentional infliction of emotional distress. Plaintiff's only factual allegations supporting this claim are that Defendant Sopko "berated Kastler with allegations and insults including that he lied about [the general manager] and that he 'needed professional help'".

Liability for intentional infliction of emotional distress arises only when "extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another." *Yeager v. Loc. Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 6 Ohio St.3d 369, 453 N.E.2d 666, (1983) syllabus, abrogated on other grounds, *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007–Ohio–2451, 866 N.E.2d 1051. "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.*, citing Restatement of the Law 2d, Torts 71, Section 46(1) (1965). "Serious emotional distress" goes beyond merely trifling disturbance, mere upset, or hurt feelings. *Paugh v. Hanks*, 6 Ohio St.3d 72, 78, 451 N.E.2d 759 (1983). The emotional injury must be so severe

and debilitating that "a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case." *Id.*

Plaintiff's Complaint fails to plead conduct by any of the Defendants that rises to the level of conduct "so outrageous in character, or so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Accordingly, Defendants' Motion to Dismiss Count V of Plaintiff's Complaint is well taken.

III. CONCLUSION.

For the foregoing reasons, **DEFENDANTS' MOTION TO DISMISS COUNTS IV AND V OF PLAINTIFF ADAM KASTLER'S COMPLAINT IS GRANTED.**

IT IS SO ORDERED.

JUDGE BRENDAN J. SHEEHAN

Dated: 2/1/12

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to the following this 14th day of February, 2012.

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