

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

Mark Whitaker

Court of Appeals No. OT-12-021

Appellant

Trial Court No. 10-CV-666H

v.

FirstEnergy Nuclear Operating Company,
et al.

DECISION AND JUDGMENT

Appellees

Decided: September 6, 2013

* * * * *

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

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

* * * * *

JENSEN, J.

{¶ 1} Plaintiff-appellant, Mark Whitaker, timely appeals the June 14, 2012 judgment of the Ottawa County Court of Common Pleas, granting summary judgment in favor of defendants-appellees, FirstEnergy Nuclear Operating Company (“FENOC”), FirstEnergy Corp., George Fidurski, David R. Kline, Joseph D. Hagan, Craig Fink, and

Linda Griffith, on his claims of wrongful discharge in violation of Ohio public policy, and defamation. For the reasons that follow, we affirm the trial court's judgment.

I. Background

{¶ 2} Mark Whitaker was employed by FENOC at the Davis-Besse Nuclear Power Station from 2001 until he was discharged on August 22, 2007. At the time of his termination he was working as a Nuclear Security Shift Supervisor. George Fidurski was Whitaker's direct supervisor.

{¶ 3} On February 26, 2007, one of Whitaker's co-workers complained to Fidurski that Whitaker was falsifying his timecards. As a nuclear power facility, Davis Besse is regulated by the Nuclear Regulatory Commission ("NRC") and site access is highly secured. Whitaker worked mainly in an area of the facility referred to as a "protected area." Employees with access to the protected area must swipe a badge upon entering and exiting. That activity is recorded and stored electronically in a badge history report. Upon receiving the complaint about Whitaker's allegedly fraudulent timekeeping practices, Fidurski investigated the matter by checking Whitaker's manual timecard for February 20, 2007 against the badge history report. That day, Whitaker logged eight hours on his timecard despite showing only 5 hours and 43 minutes on the automated system. Fidurski reported this to the Manager of Site Protection, David Kline.

{¶ 4} Around the same time, the NRC received an anonymous complaint containing broader allegations of timecard falsification among all Davis-Besse supervisors. It referred the complaint to FENOC's Employee Concerns Program to

investigate all eight supervisors' timekeeping for the period of June 2, 2006 to January 28, 2007. FENOC compared the supervisors' timecards against the badge history reports. Because the supervisors' duties were discharged mainly within the protected area, it was expected that the timecards and the badge history reports would closely parallel each other.

{¶ 5} The investigation revealed that several supervisors had over-reported their hours, with Whitaker being the worst offender. Three of the eight supervisors had discrepancies under three hours; three had discrepancies between 11 to 18 hours; one supervisor, Timothy Camick, had a discrepancy of 39 hours; and Whitaker had a discrepancy of 85 hours. FENOC's internal auditor, Craig Fink, gave the supervisors an opportunity to explain the discrepancies. Whitaker was able to explain some, but not all of them. After accounting for the explained discrepancies, Whitaker's timecards overstated his work hours by 70 hours. FENOC concluded that the severity of Whitaker's and Camick's discrepancies rose to the level of fraudulent timekeeping. Whitaker was placed on administrative leave starting May 30, 2007, and his employment was terminated on August 22, 2007. Camick was also terminated.

{¶ 6} Following Whitaker's termination, FENOC was required by the NRC to conduct a review to determine his trustworthiness and reliability. Based upon its timecard investigation, FENOC concluded that Whitaker's fraudulent timecard reporting demonstrated that he did not possess a "high assurance of trustworthiness and reliability." This resulted in Whitaker being flagged in a national database called Personnel Access

Data System (“PADS”), which indicates to other nuclear energy plants that Whitaker had been denied unescorted access within Davis-Besse.

{¶ 7} On February 12, 2008, Whitaker filed suit (which he dismissed and re-filed in September 2010), alleging, inter alia, wrongful discharge under R.C. 4113.52 and in violation of Ohio’s public policy in favor of workplace safety. He claims that he was terminated not because of fraudulent timekeeping practices, but in retaliation for reporting safety concerns to FENOC.

{¶ 8} During his employment with FENOC, Whitaker, like all of the security shift supervisors, was responsible for submitting “condition reports” alerting FENOC to any safety and security concerns he observed in performing his duties. Between July 2, 2002 and May 27, 2007, Whitaker wrote 136 condition reports. He claims that in mid-2006, Fidurski told him to “slow down” in writing condition reports. Whitaker believes that because he ignored this order, FENOC retaliated by terminating him. Whitaker also believes that alleged safety concerns that he shared in confidence with consultant Marie Kraft, who was working with the shift supervisors to improve performance and communication, were conveyed to his supervisors. He believes he was retaliated against for this as well.

{¶ 9} In addition to his wrongful termination claims, Whitaker asserted a claim for defamation. He contends that because he was placed on the “denied access list” and flagged in the national database, he has been unable to get another job in the power and energy industry. Because appellees’ allegations of fraudulent timekeeping caused him to

be placed on the denied access list, and because he claims that those allegations are untrue, he argues that this resulted in the publication of a defamatory statement about him (i.e., that he is not trustworthy or reliable). He claims that this caused damage to his trade or profession.

{¶ 10} After exchanging written discovery and conducting numerous depositions, appellees moved for summary judgment on September 1, 2011. On June 14, 2012, the trial court granted appellees' motion. Whitaker now appeals the trial court's judgment and assigns the following errors for our review:

First Assignment of Error: The trial court committed prejudicial and reversible error when it granted Appellees' Motion for Summary Judgment on Whitaker's workplace safety public policy whistleblower claim, given there are genuine issues of factual dispute on the record and the Appellees' [sic] are not entitled to judgment as a matter of law.

Second Assignment of Error: The trial court committed prejudicial and reversible error when it granted Appellees' Motion for Summary Judgment on Whitaker's 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} For the reasons that follow, we find Whitaker's assignments of error not well-taken, and we affirm the judgment of the Ottawa County Court of Common Pleas.

II. Standard of Review

{¶ 12} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 13} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials 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).

III. Law and Analysis

{¶ 14} In his first assignment of error, Whitaker argues that the trial court erred by granting appellees’ motion for summary judgment on his workplace safety public policy claim. The trial court based its dismissal of Whitaker’s claim on (1) its determination that no such claim exists; and (2) its conclusion that even if the claim exists, Whitaker failed to establish the elements of the claim.

{¶ 15} Whitaker was an employee at-will. The act of terminating an at-will employee’s relationship with an employer generally 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 one of the syllabus. However, if an employee is discharged or disciplined in contravention of a clear public policy articulated in the Ohio or United States Constitution, federal or state statutes, administrative rules and regulations, or common law, a cause of action for wrongful discharge in violation of public policy may exist as an exception to the general rule. *Painter v. Graley*, 70 Ohio St.3d 377, 639 N.E.2d 51 (1994), paragraph three of the

syllabus; *Greeley v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990), paragraph one of the syllabus.

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

1. That a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the *clarity* element).

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

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

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

Rizkana at 69-70, quoting *Graley*, 70 Ohio St.3d at 384, fn. 8.

{¶ 17} The clarity and jeopardy elements involve questions of law, whereas the causation and overriding justification elements involve factual questions, which are generally reserved for the trier of fact. *Id.* at 70; *see also Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, 773 N.E.2d 526, ¶ 11 (“[T]he clarity and jeopardy elements [are] questions of law to be decided by the court while factual issues relating to the causation and overriding justification elements [are] generally for the trier of fact to

resolve.”). To avoid summary judgment, however, the employee must establish a genuine issue of material fact as to each of the four elements. *Mangino v. W. Reserve Fin. Corp.*, 9th Dist. Wayne No. 11-CA-0050, 2012-Ohio-3874, ¶ 11, citing *Himmel v. Ford Motor Co.*, 342 F.3d 593, 598 (6th Cir.2003).

{¶ 18} Citing *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, 875 N.E.2d 36, the trial court concluded that Ohio does not recognize a common law action for wrongful termination in violation of Ohio’s public policy favoring workplace safety because R.C. 4113.52 provides an adequate remedy for protecting employees who report workplace safety concerns. Despite this conclusion, the trial court analyzed the four elements of Whitaker’s public policy claim and determined that even if such a claim exists, Whitaker failed to establish each element. We believe that the trial court misapplied *Leininger* and that a claim for wrongful discharge in violation of public policy favoring workplace safety may exist independent of R.C. 4113.52 if the four elements of a public policy tort are established. See *Dohme v. Eurand Am., Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, 956 N.E.2d 825 (discussed below). However, we agree with the trial court that Whitaker failed to establish those elements, thus the trial court correctly dismissed his claim.

1. Clarity and Jeopardy

{¶ 19} To state a valid public policy tort, the employee must show that a clear public policy existed and was manifested in a state or federal constitution, statute, or administrative regulation, or in the common law. This is referred to as “the clarity

element.” The Ohio Supreme Court in *Dohme*, recognized the possibility that a claim for wrongful discharge in violation of Ohio’s public policy favoring workplace safety may exist, but held that the plaintiff in that case failed to satisfy the clarity element.

{¶ 20} In *Dohme*, the employee claimed that he was terminated in violation of Ohio’s public policy favoring workplace safety because he was discharged after expressing fire safety concerns to an insurance company representative who was inspecting the facility. As the source of his public policy claim, he recited syllabus language from the Ohio Supreme Court’s decision in *Pytlinski v. Brocar Prods., Inc.*, 94 Ohio St.3d 77, 760 N.E.2d 385 (2002): “Ohio public policy favoring workplace safety is an independent basis upon which a cause of action for wrongful discharge in violation of public policy may be prosecuted.” He also cited generally to the plurality opinion of *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 152, 677 N.E.2d 308 (1997). The court held that “the mere citation of the syllabus in *Pytlinski* is insufficient to meet the burden of articulating a clear public policy of workplace safety.” The court explained that “as the plaintiff, *Dohme* has the obligation to specify the sources of law that support the public policy he relies upon in his claim.” *Dohme* at ¶ 22. Because he did not cite any specific, applicable source of law, he did not satisfy the clarity element.

{¶ 21} Whitaker insists that as opposed to simply citing the *Pytlinski* syllabus, as the *Dohme* plaintiff had, he cited specific statutory authority for the public policy upon which he based his claim. While it is true that he did not cite the syllabus, it appears that Whitaker merely recited footnote two of *Pytlinski*, which provides examples of Ohio

statutes promoting safety in the workplace, and he added a reference to an Occupational Safety and Health Administration (“OSHA”) statute.¹ But Whitaker failed to establish that any of these statutes were applicable to his claim or had any bearing on the facts at issue in the case.

{¶ 22} Whitaker cited 29 U.S.C. 660(c)(1), which makes it illegal to terminate an employee in retaliation for filing a complaint or instituting a proceeding with OSHA. It is undisputed that Whitaker filed no complaint with OSHA. This statute is inapplicable to his claim.

{¶ 23} Whitaker also cited Article II, Section 35 of the Ohio Constitution. That provision authorizes the establishment of the state workers’ compensation fund. Whitaker’s condition reports do not present workers’ compensation violations. Again, this provision is inapplicable.

{¶ 24} Article II, Section 34, also cited by Whitaker, authorizes the legislature to pass laws “fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees.” In fact, the legislature has enacted such laws (e.g., R.C. 4113.01 (hours constituting a day’s work), R.C. 4113.02 (overtime), R.C. Chapter 4111 (minimum fair wage standards), Chapter 4123 (workers’ compensation), etc.). However, *Dohme* required Whitaker to

¹ Notably, Whitaker did not cite this statutory authority in his complaint. He provided citations only after appellees moved for summary judgment.

identify *specific*, clear law applicable to his claim—not just to cite to a general provision authorizing such laws to be passed.

{¶ 25} Finally, Whitaker cited R.C. 4101.11 and 4101.12. These statutes require employers to provide a safe workplace for their employees and are most frequently cited in premises liability and employer intentional tort cases. The statutes are very general and broad. Again, *Dohme* requires citation to specific, clear law. Although Whitaker eventually asserted that some of the incidents in his condition reports violated unspecified provisions of the Nuclear Regulatory Act and OSHA, he never identified which specific laws were allegedly violated. Under *Dohme*, he was required to identify the specific provisions that he believed were applicable to the facts at issue in the case. *See e.g.*, *Lesko v. Riverside Methodist Hosp.*, 10th Dist. Franklin No. 04AP-1130, 2005-Ohio-3142, ¶ 35 (finding that employee who merely listed examples of safety statutes failed to establish “clear public policy applicable to the facts of [the] case”).

{¶ 26} In addition to failing to cite specific, applicable statutes giving rise to his public policy claim, Whitaker also failed to describe how FENOC jeopardized workers’ safety. While he provided examples of what he apparently considered to be the most egregious or prevalent safety violations, the trial court properly held that they did not suffice to establish the type of safety violations that R.C. 4101.11 and 4101.12 were enacted to prevent. *But see Blair v. Honda of America Mfg., Inc.*, 3d Dist. Union No. 14-0133, 2002-Ohio-1065 (finding clear public policy under R.C. 4101.11 and 4101.12 where employer forced employee to work in area containing carpet and insulation fibers,

knowing that employee was recently diagnosed with carpet allergy). Of the 136 condition reports that he wrote during the course of his employment, he points to five specific reports that he claims demonstrate safety violations by appellees:

(1) A January 13, 2006 condition report reporting that an unspecified employee failed to self-check a door which resulted in that door being left ajar for one minute. The employee was briefed on proper door usage and a PowerPoint door issue summary was provided to employees.

(2) A March 6, 2006, condition report reporting that a speaker was not providing an audible alarm. The issue was investigated and corrected, leaving that alarm inoperable for a period of 17 hours.

(3) Four condition reports dated March and April of 2006, reporting that contract employees had forgotten their badges, and a March 30, 2006, report that an employee was not in possession of his badge. All reports were immediately remediated by the badges being located. There was no unauthorized usage of the badges.

(4) An April 18, 2007 condition report setting forth Whitaker's personal opinion about deficiencies in the adversary training program, including his recommendation that there be a "pre-job" briefing on the training drill and a "buddy" patdown to remove live ammunition from training.

(5) A May 27, 2007 condition report noting that an alarm panel door in the central alarm station was secured with duct tape. Whitaker also included within this report that a console was dusty, a microwave was not working, and ceiling filters were dirty. All of these issues were investigated and determined to be the result of poor housekeeping practices. The panel door issue was remediated by removing the duct tape and securing the alarm panel with Velcro.

{¶ 27} We agree with the trial court that none of these condition reports provide evidence of an unsafe work environment. The March 6, 2006 and May 27, 2007 reports appear to describe simple maintenance issues that were responded to and remediated within hours of being identified. The April 18, 2007 report is simply a suggestion for improving upon a safety drill and Whitaker conceded at his deposition that the condition report was addressed and corrective actions were implemented. The March and April 2006 incidents involved employees forgetting their badges and did not result in any unauthorized use of badges. And those incidents, as well as the incident described in the January 13, 2006 report, describe simple errors by Whitaker's co-workers and not any failure by his employer to protect its employees' safety. To the contrary, what these condition reports appear to establish is that appellees do, in fact, take measures to provide a safe working environment for its employees and encourage employees to submit condition reports when they observe opportunities for improving safety.

{¶ 28} Whitaker has failed to identify specific, clear, and applicable statutes, rules, or constitutional provisions to support his public policy claim and has, therefore, failed to establish the clarity element.

{¶ 29} Turning to the jeopardy element, while cases interpreting this element often focus on whether statutory remedies exist that are adequate to promote the particular public policy (thus rendering the public policy claim unnecessary), Whitaker's failure to cite specific and applicable statutes, regulations, or constitutional provisions, combined with his failure to identify complaints of unsafe working conditions, prevents us from engaging in that specific analysis. *See, e.g., Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, 773 N.E.2d 526, ¶ 15 (“An analysis of the jeopardy element necessarily involves inquiring into the existence of any alternative means of promoting the particular public policy to be vindicated by a common-law wrongful-discharge claim.”). We, therefore, find that the trial court properly concluded that Whitaker failed to satisfy the jeopardy element of his claim.

2. Causation and Overriding Justification

{¶ 30} Even if Whitaker satisfied the clarity and jeopardy elements, he failed to satisfy the causation and overriding justification elements.

{¶ 31} The causation and overriding justification elements of a public policy wrongful discharge claim involve considerations of factors similar to those used in determining whether an employee was unlawfully discharged in a statutory retaliation claim. *Sells v. Holiday Mgt. Ltd.*, 10th Dist. Franklin No. 11AP-205, 2011-Ohio-5974,

¶ 22. On a retaliation claim, to establish a prima facie case, the employee must show that (1) he engaged in protected activity; (2) his employer knew he engaged in protected activity; (3) his employer subsequently took an adverse employment action; and (4) the adverse employment action causally related to the protected activity. *Ladd v. Grand Trunk W. R.R., Inc.*, 552 F.3d 495, 502 (6th Cir.2009). After the employee establishes a prima facie case, the burden shifts to the employer to offer a legitimate, non-retaliatory reason for its action. *Morris v. Oldham Cty. Fiscal Ct.*, 201 F.3d 784, 793 (6th Cir. 2000), quoting *McDonnell Douglas v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed2d 668 (1973). At this point, the burden shifts again to the employee to show that the employer's asserted reason was a pretext for unlawful retaliation. *Id.*, quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089 (1981).

{¶ 32} The causation element of a public policy claim is analyzed much like the causal relation element of a prima facie retaliation claim, and the overriding justification element is analyzed much like the burden on the employer to assert a legitimate, non-retaliatory reason for its actions. *Sells* at ¶ 22. Whitaker has failed to create a genuine issue of material fact (1) that he was terminated because he reported concerns about workplace safety, or (2) that appellees' overriding justification for terminating him was pretextual.

{¶ 33} Whitaker claims that causal connection can be inferred from statements Fidurski made to him. For instance, Whitaker testified that Fidurski told him in mid-2006 to slow down in writing condition reports. He also claims that in 2006 and early

2007, he participated in meetings where he voiced workplace safety concerns to a consultant who had been hired by FENOC to improve performance and communication among the shift supervisors. He contends that a month before he was placed on administrative leave preceding his termination, Fidurski told the shift supervisors that he “got his butt whipped” because of the numerous workplace safety concerns raised by Whitaker. Whitaker also asserts that because he was placed on administrative leave the day after he filed his last condition report on May 27, 2007, the temporal proximity between his complaint and the adverse employment decision creates an inference that his filing of condition reports was the reason he was terminated.

{¶ 34} As an initial matter, this district has held that “temporal proximity does not support a claim of retaliation absent other compelling evidence.” *Coch v. Gem Indus.*, 6th Dist. Lucas No. L-04-1357, 2005-Ohio-3045, ¶ 40, citing *Boggs v. The Scotts Co.*, 10th Dist. Franklin No. 04AP-425, 2005-Ohio-1264, ¶ 26. Whitaker has provided no compelling evidence. He apparently submitted condition reports as one of the duties of his position and had been doing so since 2002 with no repercussions. Moreover, the investigation into supervisors’ timekeeping practices was well underway before he was placed on administrative leave. That he submitted a condition report the day before he was placed on administrative leave for fraudulent timekeeping presents more of a coincidence than a causal connection.

{¶ 35} But even if Whitaker could establish causation, he has not provided evidence sufficient to create a genuine issue of material fact that appellees’ reason for

terminating him was pretextual. In other words, he failed to put forth sufficient evidence to refute that appellees had an overriding justification for terminating him.

{¶ 36} Appellees' stated reason for terminating Whitaker was his fraudulent timekeeping practices. Appellees conducted an audit of *all* eight security shift supervisors (whose jobs also required them to submit condition reports) and discovered that Whitaker overstated his hours worked by at least 70 hours over a six-month period of time—by far the biggest discrepancy in the department. Although he claimed that a percentage of his work was spent outside of the areas that would be captured by the computer time records, he admitted at deposition that his job was no different than the other security shift supervisors'. Despite the fact that his job was no different than the other security shift supervisors', Whitaker's time discrepancy far exceeded the others'. Three of the supervisors had almost perfect timekeeping (discrepancies of under three hours); three had discrepancies, but far fewer than Whitaker and more consistent with sloppy timekeeping than with intentional misreporting (between 11-19 hours); and the other employee with a significant discrepancy (approximately 40 hours) was also terminated.

{¶ 37} Whitaker conceded that he was provided opportunities to mitigate the difference between his timesheets and the number of hours captured by the computer system. He never requested to review any day planners, notes, calendars, memos, or other documentation to explain the variation. He was able to account for only a few hours' difference, bringing the discrepancy down from approximately 85 hours to 70

hours. (This was even after discrepancies under 30 minutes were excluded.) Appellees terminated Whitaker for this theft of time which amounted to an overpayment to Whitaker of approximately \$2,700.

{¶ 38} Whitaker maintains that the statements that Fidurski made demonstrate that it was the condition reports—and not his fraudulent timekeeping practices—that led to his termination. For instance, he claims that Fidurski commented in 2006 that Whitaker had an “X” on his back because of all the condition reports he had filed and that he was making the department look bad. He also claims that in a meeting with all eight of the security shift supervisors in April of 2007, Fidurski allegedly complained to them that he “got his butt chewed off” by his supervisors because of what his employees had told the consultant, and he threatened that they would suffer the consequences.

{¶ 39} First, we note that Fidurski was not responsible for the decision to fire Whitaker. Setting that aside, as to the 2006 comment, this isolated statement made a year before he was terminated is insufficient to show that appellees’ stated reason for terminating him was pretextual. *Gerding v. Girl Scouts of Maumee Valley Council, Inc.*, 6th Dist. Lucas No. L-07-1234, 2008-Ohio-4030, ¶ 32. And the April 2007 comment was directed toward the whole group of security shift supervisors and not to Whitaker specifically. In fact, Whitaker’s co-worker, Lorrie Woytyshyn, testified that she did not interpret this statement as being threatening, and another co-worker, Ron Thompson, did not even remember the statement being made. This evidence simply does not create a

genuine issue of material fact sufficient to refute appellees' reason for terminating Whitaker.

{¶ 40} Because Whitaker has failed to raise a genuine issue of material fact as to the causation and overriding justification elements of his public policy claim, the trial court properly granted summary judgment to appellees.

{¶ 41} In his second assignment of error, Whitaker contends that the trial court erred when it granted summary judgment in favor of appellees on his defamation claim. He argues that he presented evidence from which a jury could find that he did not falsify his timecards. Because this allegedly false information led appellees to conclude that he was not sufficiently trustworthy and reliable to be permitted unescorted access in a nuclear facility, causing him to be flagged by PADS, Whitaker was defamed.

{¶ 42} Defamation is defined as:

[A] false and malicious publication against an individual made with an intent to injure his reputation or to expose him to public hatred, contempt, ridicule, shame, or disgrace or to affect him injuriously in his trade, business or profession. It is defamatory, and actionable at law, if as a proximate consequence of the libel the individual against whom it is published occasions a pecuniary loss. *Robb v. Lincoln Publishing (Ohio), Inc.*, 114 Ohio App.3d 595, 616, 683 N.E.2d 823 (12th Dist.1996).

{¶ 43} A court must decide as a matter of law whether a statement is defamatory. *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 372, 453 N.E.2d 666 (1983), *abrogated on other grounds*, *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E.2d 1051. When making this legal determination, the trial court must “review the statement under the totality of the circumstances.” *Mendise v. Plain Dealer Publishing Co.*, 69 Ohio App.3d 721, 726, 591 N.E.2d 789 (8th Dist.1990).

{¶ 44} Ohio recognizes several defenses to a defamation claim. For example, “a defendant who can prove the truth of the allegedly defamatory statement has an absolute defense.” *Early v. The Toledo Blade*, 130 Ohio App.3d 302, 322, 702 N.E.2d 107 (6th Dist.1998), citing *Shifflet v. Thomson Newspapers (Ohio), Inc.*, 69 Ohio St.2d 179, 183, 431 N.E.2d 1014 (1982). Here, the trial court determined that summary judgment was appropriate on Whitaker’s defamation claim because the allegedly defamatory statement was true. We agree.

{¶ 45} The evidence is clear that Whitaker’s name was flagged in the PADS database in order to denote the fact that FENOC had denied Whitaker unescorted access to its nuclear facilities. Because it is true that FENOC denied Whitaker such access following its investigation into the timecard discrepancies, FENOC has established an absolute defense to Whitaker’s defamation claim. Thus, summary judgment in favor of FENOC was appropriate. *Early* at 322 (“When a defendant is able to demonstrate the truth of the allegedly defamatory statement, summary judgment can properly be granted.”).

{¶ 46} Accordingly, Whitaker’s second assignment of error is not well-taken.

IV. Conclusion

{¶ 47} The trial court properly held that appellant failed to establish the four elements of his claim for wrongful termination in violation of public policy. The trial court also properly concluded that Whitaker’s defamation claim failed because the statement that was published was true. We, therefore, affirm the June 14, 2012 judgment of the Ottawa County Court of Common Pleas. The costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

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

Mark L. Pietrykowski, J.

James D. Jensen, J.
CONCUR.

Stephen A. Yarbrough, J.,
DISSENTS IN PART AND
WRITES SEPARATELY.

JUDGE

JUDGE

YARBROUGH, J.

{¶ 48} Because I would reverse the judgment of the Ottawa County Court of Common Pleas with respect to Whitaker’s first assignment of error, I respectfully dissent. In particular, I would hold that Whitaker has met his burden of establishing a genuine issue of material fact with respect to each of the four elements of his wrongful discharge claim, making summary judgment improper. I concur with the majority’s determination on Whitaker’s second assignment of error.

{¶ 49} With respect to the clarity element, the majority determines that Whitaker failed to cite a specific provision in a statute, constitution, regulation, or the common law that supports the public policy upon which he bases his claim. Specifically, the majority states that “it appears that Whitaker merely recited footnote two of [*Pytlinski v. Brocar Prods., Inc.*, 94 Ohio St.3d 77, 760 N.E.2d 385 (2002)], which provides examples of Ohio statutes promoting safety in the workplace, and he added a reference to an Occupational Safety and Health Administration * * * statute.” Ultimately, the majority relies upon the Ohio Supreme Court’s decision in *Dohme v. Eurand Am., Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, 956 N.E.2d 825, in concluding that Whitaker failed to establish the clarity element.

{¶ 50} In *Dohme*, the court stated:

The mere citation of the syllabus in *Pytlinski* is insufficient to meet the burden of articulating a clear public policy of workplace safety.

Further, *Dohme* only generally mentioned or identified any legal basis for a

statewide policy for workplace health and safety. Dohme did not cite any specific statement of law in support of his claim of public policy that was drawn from the federal or state constitution, federal or state statutes, administrative rules and regulations, or common law. In contrast, the *Pytlinski* and [*Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 677 N.E.2d 308 (1997)] plaintiffs both alleged that their respective employers had violated federal OSHA regulations. * * * Thus, Dohme failed to establish the existence of a clear public policy applicable to him in this matter. *Id.* at ¶ 21.

{¶ 51} Here, although it is true that Whitaker made reference to *Pytlinski* and *Kulch* in his opposition brief, he did not stop there. Indeed, Whitaker stated that his wrongful discharge claim “is based upon both the Occupational Health & Safety Act, [29 U.S.C. 660(c)(1),] and Ohio public policy favoring workplace safety embodied in R.C. 4101.11.” Whitaker cited R.C. 4101.12 as an additional source of public policy concerning workplace safety. The majority acknowledges Whitaker’s reference to the foregoing sources of public policy. However, it concludes that Whitaker failed to establish that any of the cited sources are applicable to his claim. I disagree.

{¶ 52} In *Pytlinski*, the Ohio Supreme Court included R.C. 4101.11 and 4101.12 in its list of statutes that comprise “the abundance of Ohio statutory and constitutional provisions that support workplace safety and form the basis for Ohio’s public policy.” *Pytlinski* at 79. While the majority determines that these statutes are “very general and

broad,” its argument is belied by the holding in *Pytlinski*. Unlike the plaintiff in *Dohme*, Whitaker goes beyond mere citation to a case syllabus and actually cites specific statutes that have been interpreted by the Ohio Supreme Court as embodying the public policy under which Whitaker brings his claim. For that reason, I would hold that Whitaker has met his burden under the clarity element.

{¶ 53} Likewise, I would conclude that Whitaker has met his burden under the jeopardy element. The majority suggests that Whitaker failed to satisfy the jeopardy element of his wrongful discharge claim due to his “failure to cite specific and applicable statutes, regulations, or constitutional provisions, combined with his failure to identify complaints of unsafe working conditions.” However, in light of Whitaker’s citation to R.C. 4101.11 and 4101.12, I must disagree with the majority.

{¶ 54} In order to establish the jeopardy element, a plaintiff must show that “dismissing employees under circumstances like those involved in the plaintiff’s dismissal would jeopardize the public policy.” *Collins v. Rizkana*, 73 Ohio St.3d 65, 69-70, 652 N.E.2d 653 (1995). Whitaker alleges that he was terminated because he filed numerous condition reports outlining various issues pertaining to workplace safety. In accordance with the public policy favoring workplace safety, which is clearly set forth in R.C. 4101.11 and 4101.12, I conclude that allowing FENOC to terminate Whitaker following his filing of these condition reports would jeopardize the public policy. Thus, I would hold that Whitaker has established the jeopardy element.

{¶ 55} Finally, as to the causation and overriding justification elements, the case law is clear these elements are generally issues of fact to be decided by the trier of fact. *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, 773 N.E.2d 526, ¶ 11. Given the evidence proffered by Whitaker, including the threatening statements Fidurski made to Whitaker within close proximity of his placement on administrative leave, I find that a genuine issue of material fact exists as to whether FENOC's termination decision was motivated by the condition reports Whitaker filed, or by Whitaker's overstatement of his hours. Therefore, I would hold that summary judgment was improper as to Whitaker's wrongful discharge claim against FENOC.

{¶ 56} Having determined that Whitaker satisfied the clarity and jeopardy elements, and further, that he raised a genuine issue of material fact as to the causation and overriding justification elements, I conclude that summary judgment in FENOC's favor was inappropriate. Accordingly, I would reverse the trial court's judgment with respect to Whitaker's wrongful discharge claim.

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
