IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

PAUL TEMPLE, Plaintiff, vs. AARON KESSLER, INDIVIDUALLY and d/b/a AK WELDING, LLC, Defendants.	:	No. CV-19-1228 Civil Action – Law *Preliminary Objections*

ORDER

AND NOW, following argument held June 10, 2020, on Defendants' Preliminary Objections to Second Amended Complaint, the Court hereby issues the following ORDER.

Pursuant to the averments in Plaintiff Paul Temple's ("Plaintiff") Second Amended Complaint, Plaintiff began working for Defendant Aaron Kessler ("Defendant"), d/b/a AK Welding, LLC (collectively "Defendants") as a welder's helper some time in 2018. On or about May 13, 2019, Plaintiff was notified that he would not be paid due to alleged damages to property and "personal domestic issues."[1] Plaintiff went to speak with Defendant's brother, Tony Kessler, also an AK Welding employee, regarding his pay. The conversation escalated to an argument when Tony Kessler allegedly struck Plaintiff on the back of the head with a pipe, causing fractures to Plaintiff's C5 and C6 cervical discs. Plaintiff was immediately transferred to Muncy Hospital, where he received emergency care. Following this incident, Defendant notified Plaintiff that he was terminated.[2]

Within his Second Amended Complaint, filed March 10, 2020, Plaintiff raises two counts. Under Count I – Wrongful Termination, Plaintiff asserts that he was subject to wrongful termination in violation of public policy because he was the victim of a criminal assault in the workplace. Alternately, Plaintiff alleges that he was subject to wrongful termination because he questioned various illegal activities of Defendant and Tony

[1] The Court notes that the Second Amended Complaint is not specific about the substance of these domestic issues.
[2] The Second Amended Complaint does not specify what reason, if any, Defendant provided Plaintiff for the termination.

Kessler and reported those activities to his employer.[3]

Under Count II – Punitive Damages, Plaintiff asserts a claim for punitive damages on the basis that Defendants: negligently failed to supervise Tony Kessler; failed to enforce proper rules and regulations of protect their employees; failed to properly train and screen their employees in conformance with Defendants' "Code of Conduct and other policies and procedures" ("Code of Conduct"); failed to properly discipline or terminate Tony Kessler, and; failed to warn Plaintiff of Tony Kessler's prior history of abusive and inappropriate behavior toward other employees, of which Defendants knew or should have known.

Defendants' Preliminary Objections to Second Amended Complaint, filed May 1, 2020, raises two objections. Defendants' First Preliminary Objection objects that Plaintiff has failed to identify a clear mandate of public policy in support of his Count I claim for wrongful termination. Defendants' Second Preliminary Objection objects that Plaintiff's Count II claim for punitive damages fails to plead with specificity the legal and factual basis for his claim as required under the Pa.R.C.P.1028(a)(3). Alternately, Defendants assert that Count II should be dismissed pursuant to Pa.R.C.P. 1028(a)(2) and Pa.R.C.P. 1019(i) for failing to conform to rule of law, specifically for Plaintiff's failure to identify the precise provision of the Code of Conduct that Defendants purportedly violated and for failure to attach a copy of the Code of Conduct to the Complaint. Finally, Defendants object pursuant to Pa.R.C.P. 1028(4) for legal insufficiency of the pleading, asserting that because Plaintiff's punitive damages claim is derivative of his wrongful termination claim, Count II should also be dismissed if the Court sustains Defendants' objection to Count I.

The Court will first determine whether Plaintiff has established a clear mandate of public policy supportive of his claim for wrongful termination. Plaintiff asserts that he was a victim of criminal assault in the workplace, and therefore his termination of employment violated Article I, Section 1 of the Pennsylvania Constitution, which

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[3] This averment within the Second Amended Complaint is difficult to decipher, as Defendant was Plaintiff's employer. The Court interprets this averment to mean that Plaintiff informed Defendant prior to his termination that he knew Defendant and Tony Kessler were involved in illegal activity.

protects a citizen's liberty and happiness.[4] Plaintiff notes that the courts have interpreted Article I, Section 1 as protecting the right of a workman to work without the hindrance of others,[5] and have defined "liberty" as including the right of self-defense.[6] Plaintiff further asserts that Defendant violated criminal statute 18 Pa.C.S.A. § 4957, Protection of Employment of Crime Victims, Family Members of Victims and Witnesses, which states:

> (a) An employer shall not deprive an employee of his employment, seniority position or benefits, or threaten or otherwise coerce him with respect thereto, because the employee attends court by reason of being a victim of, or a witness to, a crime or a member of such victim's family. Nothing in this section shall be construed to require the employer to compensate the employee for employment time lost because of such court attendance

Plaintiff additionally alleges his employer violated criminal statute 18 Pa.C.S.A. § 4953, Retaliation against Witness, Victim, or Party, which provides, "[a] person commits an offense if he harms another by any unlawful act or engages in a course of conduct or repeatedly commits acts which threaten another in retaliation for anything lawfully done in the capacity of witness, victim or a party in a civil matter."

Under Pennsylvania law, employment is presumed to be at-will unless it is shown that the parties have contracted to restrict the right to terminate employment.[7] An at-will employee may be terminated at any time, for any reason, subject to limited exceptions.[8] "A tort claim for wrongful discharge may be brought only in the limited circumstance where an employer terminates an at-will employee in violation of a clear mandate of public policy."[9]

> To justify the application of the public policy exception, the employee must point to a clear public policy articulated in the constitution, statutes,

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[4] PA. CONST. Art. I, § 1 ("All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.").
[5] *See Erdman v. Mitchell*, 56 A, 327 (Pa. 1903).
[6] *Com. v. Brown*, 8 Pa. Super. 339 (1898).
[7] *See McLaughlin v. Gastrointestinal Specialists, Inc.*, 750 A.2d 283, 186-87 (Pa. 2000).
[8] *Id.* at 286.
[9] *Russo v. Allegheny Cty.*, 125 A.3d 113, 118 (Pa. Commw. 2015), aff'd, 150 A.3d 16 (Pa. 2016) (citing *Weaver v. Harpster*, 975 A.2d 555, 563 (Pa . 2009); *Clay v. Advanced Computer Applications, Inc.*, 559 A.2d 917, 918 (Pa. 1989)).

> regulations or judicial decisions directly applicable to the facts in the case; it is not sufficient that the employer's action toward the employee is unfair. Even when an important public policy is involved, the employer may still discharge the at-will employee, if the employer has a separate, plausible and legitimate reason for the discharge.[10]

"The Superior Court has. . .noted three categories where a violation of public policy has consistently been held to support a claim for wrongful discharge: (1) requiring an employee to commit a crime; (2) preventing an employee from complying with a statutorily imposed duty; and (3) discharging an employee when specifically prohibited from doing so by statute."[11] When finding that an employee has been discharged for complying with a statutorily imposed duty or that an employee has been discharged when prohibited by statute, the courts have typically only found a violation of public policy where there is legislation directly on point. The Pennsylvania Superior Court in *Krajsa v. Keypunch, Inc.*, identified only three circumstances in which the case law had established a clear violation of public policy.[12] In *Field v. Philadelphia Electric Co.*, the Superior Court found a violation of clear public policy when an employee was terminated for reporting nuclear safety violations, as required under federal statute.[13] In *Hunter v. Port Authority*, the Superior Court found a violation of clear public policy, determining the employer had violated Article I, Section 1 of the Pennsylvania Constitution for terminating an employee on the basis of a prior conviction for which he had been pardoned.[14] In *Reuther v. Fowler & Williams, Inc.*, the Superior Court found a clear violation of public policy where the employee was terminated after reporting for jury duty.[15,16]

In contrast, the Superior Court in *Krajsa* found no violation of a clear mandate of

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[10] *Scrip v. Seneca*, 191 A.3d 917, 928 (Pa. Commw. 2018), appeal denied, 201 A.3d 151 (Pa. 2019) (quoting *Davenport v. Reed*, 785 A.2d 1058, 1063-64 (Pa. Commw. 2001)).
[11] *Owens v. Lehigh Valley Hosp.*, 103 A.3d 859, 863 n.7 (Pa. Commw. 2014) (citing *Mikhail v. Pennsylvania Org. for Women in Early Recovery*, 63 A.3d 313, 317 (Pa. Super. 2013)).
[12] *Krajsa v. Keypunch, Inc.*, 622 A.2d 355, 359 (Pa. Super. 1993).
[13] *See Field v. Phila. Elec. Co.*, 565 A.2d 1170 (Pa. Super. 1989).
[14] *See Hunter v. Port Authority*, 419 A.2d 631 (Pa. Super. 1980).
[15] *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119 (Pa. Super. 1978).
[16] More recent cases identifying a termination in violation of a clear mandate of public policy are provided in *Owens*, 103 A.3d at 863 n.7 (Pa. Commw. 2014) ("*Raykovitz v. K Mart Corp*., 445 Pa.Super. 378, 665 A.2d 833 (1995) (for filing an unemployment compensation claim); *Highhouse v. Avery Transportation*, 443 Pa.Super. 120, 660 A.2d 1374 (1995) (same); and *Kroen v. Bedway Security Agency*, 430 Pa.Super. 83, 633 A.2d 628 (1993) (for refusing to submit to a polygraph test)[.])").

public policy when the employee was purportedly terminated for his expressed willingness to report to the proper authorities that his employers were engaging in unlawful business practices. The Court noted that while this would be a violation of section 1423 of the Pennsylvania Whistleblower Law ("Act") if the employer was a governmental-entity or was funded by the government, as the employer was not covered by the Act the employee's discharge could not be construed as a clear violation of Pennsylvania public policy.[17] Similarly, the Pennsylvania Supreme Court held in *McLaughlin v. Gastrointestinal Specialists, Inc.*, that an employer's retaliatory discharge of an employee who made a mandatory reporting under the federal OSHA statute did not sufficiently implicate Pennsylvania state policy as to support a wrongful discharge claim.[18] Interpreting *McLaughlin*, the Court concludes that Plaintiff would only be able to establish a claim for wrongful termination in violation of public policy if Defendants' actions were a direct violation of a Pennsylvania statutory scheme.

The Court finds that Plaintiff's claim does not fall within the scope of section 4957(a), as nothing within the pleadings suggest that he was discharged due to a court appearance.[19] Similarly, Plaintiff has not established that his claim falls within the scope of 4953(a), as he has not pled facts to support a claim that he was subject to harm or threats in retaliation for anything he had done as a victim, witness, or party to a civil matter.[20] The Court also notes that the Superior Court has held that an allegation that an employee was terminated for acting in self-defense does not fall within the public policy exception.[21] Finally, the Court finds the nexus between Plaintiff's claim of

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[17] *Krajsa*, 622 A.2d at 360.
[18] *McLaughlin*, 750 A.2d at 289-300.
[19] Plaintiff has cited *Freeman v. McKeller*, 795 F.Supp. 733 (E.D. Pa. 1992) as an analogous case, but *Freeman* is clearly distinguishable as Plaintiff in that case had been subpoenaed to appear before the grand jury to testify to his employer's charged unlawful appropriation of funds.
[20] The Court additionally notes that while verbal threats alone may constitute harm, an isolated incident involving verbal threats will generally be found insufficient to constitute harm. *Com. v. Ostrosky*, 909 A.2d 1224 (Pa. 2006). However, while Plaintiff's counsel contended at argument that Plaintiff's termination was intended to intimidate him from talking to police (although the Court would assume that termination would only incentivize Plaintiff to contact police), there are no allegations that Defendant made explicit threats. It is therefore unclear what "harm" Plaintiff alleges to have suffered on the part of Defendant aside from his termination, and what "unlawful act" was committed aside from the alleged wrongful termination. It is a logical fallacy for Plaintiff to rely on a statute prescribing the performance of unlawful acts to establish that Defendant did in fact commit a wrongful discharge.
[21] *See Scott v. Extracorporeal, Inc.*, 545 A.2d 334, 342 (Pa. Super. 1988) (reasoning that even if employees act entirely in self-defense or do not land a blow, employers have a legitimate interest in discharging employees perceived to be a disruptive influence). The Court notes that the Second

wrongful discharge for acting in self-defense or, alternately, for questioning the purported illegal activities of Tony Kessler and Defendants, too nebulously connected to his liberty rights under Article I, Section 1 of the Pennsylvania Constitution to establish a violation of a clear mandate of public policy.[22] Therefore, Defendants' First Preliminary Objection is SUSTAINED.

The Court next addresses whether Plaintiff has sufficiently pled his claim for punitive damages.[23] The Court first notes that Plaintiff has plead his claim for punitive damages as a separate count, which is technically improper, as punitive damages are not a separate cause of action.[24] As the Court has sustained Defendants' objection to the wrongful discharge claim, the punitive damages claim is also subject to dismissal pursuant to Pa.R.C.P. 1028(a)(4), based on insufficiency of the pleading. The Court additionally finds that the Second Amended Complaint fails to conform to rule of law by failing to cite the provisions of the Code of Conduct allegedly violated, in violation of Pa.R.C.P. 1028(a)(2), and finds that the Second Amended Complaint fails to attach the relevant sections of the Code of Conduct, in violation of Pa.R.C.P. 1019(i). Finally, the Court finds that the Second Amended Complaint fails to provide sufficient specificity to support the punitive damages claims, in violation of Pa.R.C.P. 1028(a)(3). For example, Plaintiff's claim for punitive damages avers that Tony Kessler had a prior history of abusive and inappropriate behavior of which the Defendants knew, or should have known, but there are no facts alleged supportive of this claim. Therefore, Defendants' Second Preliminary Objection is SUSTAINED.

Plaintiff shall have twenty (20) days from the date of this Order to file a Third Amended Complaint.[25]

Amended Complaint do not actually allege that Defendant terminated Plaintiff for "acting in self-defense." However, as Plaintiff has attempted to establish a public policy violation by citing case law holding that Article I, Section 1 of the Pennsylvania Constitution protects the right to self-defense, the Court can only assume that Plaintiff intended to establish that one of the bases for his termination was that he acted in lawful self-defense.

[22] Plaintiff has also cited *McLaughlin* for the proposition that discharging an employee for reporting employer misconduct to a Commonwealth agency would fall violate a clear mandate of public policy. However, there is no allegation that Plaintiff reported any misconduct to a Commonwealth agency.

[23] Pa.R.C.P. 1028(a)(3) (permitting preliminary objections for insufficient specificity in pleading).

[24] *See* Blair v. Mehta, No. 03-00954, 2004 WL 5868007 (Lyco. Cty. Sep. 10, 2004).

[25] The Court shall permit Plaintiff to refile, even though he has already filed a Complaint and two Amended Complaints, because this is the first opportunity that the Court has had to provide guidance by ruling on Defendants' Preliminary Objections. However, the Court emphasizes that Plaintiff's continued

IT IS SO ORDERED this 7th day of July 2020.

By The Court,

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Eric R. Linhardt, Judge

ERL/cp

cc:

Michael J. Zicolello, Esq.
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Gary Weber, Esq.

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failure to address the deficiencies in the pleadings at this preliminary stage may ultimately justify dismissal. *See Carlino v. Whitpain Inv'rs*, 453 A.2d 1385, 1388 (Pa. 1982) ("The right to amend should not be withheld where there is some reasonable possibility that amendment can be accomplished successfully. Where allowance of an amendment would, however, be a futile exercise, the complaint may properly be dismissed without allowance for amendment.") (quotations and citations omitted).