IN THE COURT OF COMMON PLEAS, OTTAWA COUNTY, OHIO

KENT D. JOHNSON,	*	Case No. 2024-CV-H-051
	*	
Plaintiff,	*	JUDGE ROBERT G. CHRISTIANSEN
	*	
vs.	*	**DECISION AND JUDGMENT ENTRY GRANTING MOTION TO DISMISS; DEEMING MOOT MOTION TO GRANT ADMISSIONS AND MOTION TO DISQUALIFY**
	*	
CITY OF PORT CLINTON, et al.,	*	
	*	
	*	
Defendants.	*	
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The matter is before the Court upon Defendants City of Port Clinton, Michael Snider, Tracy Colston, and Law Director Dina Shenker's motion for judgment on the pleadings filed on March 28, 2024. Plaintiff Kent D. Johnson filed his opposition on April 29, 2024. Defendants filed their reply on May 7, 2024. A hearing on the motion to dismiss was held on July 3, 2024. The matter is now properly before the Court.

Facts and Procedural History

Plaintiff was appointed as the Fire Chief of the City of Port Clinton in 2008. Plaintiff alleges that no disciplinary actions were taken against him during his time as Fire Chief until the issues that arose at the end of his tenure. Michael Snider served as the mayor of the City of Port Clinton, Tracy Colston served as the Director of Safety and Service in Port Clinton, and Dina Shenker served as the Law Director of Port Clinton.

On June 6, 2023, Shenker received a phone call from an attorney who was representing a Port Clinton EMS employee who claims that Plaintiff sexually harassed her. Following the phone call, Plaintiff was summoned to the City Building where he alleges that he was "confronted" by Shenker and Colston. Plaintiff was informed that he was not permitted be at the Port Clinton Fire Station and from having any contact with the woman making the allegations. The matter was referred to a third party to investigate the woman's claims.

The alleged victim then filed a civil protection order against Plaintiff, but that protection order was not granted. Plaintiff then requested that he be returned to his position as Fire Chief. In response, Shenker indicated that the investigation by the third party and the criminal investigation by BCI was not completed. Shenker indicated that no further action would be taken until both investigations were complete.

On December 15, 2023, the report from the investigating third party was received. On the same day, Plaintiff was served via two police officers with a "Notice of Predisciplinary Conference" to be held on December 21, 2023. The parties would later agree to continue the hearing until January 9, 2024. Plaintiff was then advised that the Defendants' intention to terminate Plaintiff. Plaintiff alleges that the proper processes were not followed pursuant to the Civil Service Statutes. Defendants now seek to dismiss the complaint alleging that Plaintiff fails to state a claim upon which a relief may be granted. Plaintiff denies these allegations.

Standard

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Civ.R. 12(C). When considering a motion pursuant to Civ.R. 12(C), the court may only review the complaint, the answer, and the materials incorporated by reference or attached as exhibits to those pleadings. *City of Huron v. McCune*, 2023-Ohio-575, ¶

57, (6th Dist.)quoting *Walker v. City of Toledo*, 2017-Ohio-416, 84 N.E.3d 216, ¶ 19 (6th Dist.). "Employing the same standard as a Civ.R. 12(B)(6) motion for failure to state a claim upon which relief may be granted, the trial court must construe as true the material allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party. If it appears from the pleadings and the materials incorporated by reference or attached as exhibits that the nonmoving party can prove no set of facts entitling it to relief, the trial court may dismiss the plaintiff's claims under Civ.R. 12(C)." (Citations omitted). *Id.*

Violation of Civil Service Statutes

Plaintiff claims that Defendants violated a variety of civil service statutes, specifically R.C. 124.34, 124.40(A), 124.62, 124.99, 124.61. R.C. 124.34(C) provides that a chief of a fire department who is removed, may file an appeal with the State Personnel Board of Review or their local civil-service commission. The common pleas court may then hear the appeal from the Board. *Id.* R.C. 124.40(A) provides that a mayor is the only person with the authority to remove the fire chief and that the fire chief may appeal this decision to the State Personnel Board of Review and an appeal from that decision may be appealed to the court of common pleas. R.C. 124.61 prohibits anyone from using their official authority to influence or secure aid. R.C. 124.62 provides that no person may fail to abide by the requirements of R.C. Chapter 124 and provides that a criminal charge will stem from such violation. Finally, R.C. 124.99 provides that whoever violates R.C. 124.62 "shall be fined not less than fifty nor more than five hundred dollars or be imprisoned not more than six months, or both." None of these statutes have an express provision that permits a person to enforce the provisions in a civil action other than appeal from the findings of the State Personnel Board of Review.

Defendant argues that there is no private cause of action for violation of the civil service statutes but rather the proper method for this argument is to appeal with the State Personnel Board of Review. In response, Plaintiff makes no argument against Defendant's claims.

In *Binder v. Cuyahoga Cnty.*, 2020-Ohio-5126, the Ohio Supreme Court found "As R.C. 124.34 allows aggrieved employees to file an appeal with the State Personnel Board of Review or their local civil-service commission and authorizes no alternative, we conclude that R.C. 124.34 does not allow a civil-service employee to file an action in common pleas court to vindicate alleged violations of the statute by an appointing authority." *See also Miracle v. Ohio Dept. of Veterans Servs.*, 2019-Ohio-3308 (finding that R.C. 124.27(B) nor R.C. 124.56 expressed a public policy to provide a basis for a civil suit to enforce the statutes) and *Franks v. Vill. of Bolivar*, N.D. Ohio No. 5:11CV701, 2011 U.S. Dist. LEXIS 133740 (R.C. 124.64 does not permit a civil action to enforce its provisions).

The Court finds that Plaintiff has failed to plead a claim upon which relief may be granted as there is no common law claim for violation of civil service statutes, the Ohio Supreme Court has denied this type of cause of action made by an aggrieved employee, and the Court does not have jurisdiction to hear any claims as Plaintiff has not filed an appeal from the Civil Service Board's decision. As such, the motion for judgment on the pleadings is found well-taken and is granted. Cause of Action One of the Complaint is hereby dismissed with prejudice.

Infliction of Emotional Distress

Plaintiff's next claim centers on Defendants inflicting emotional distress upon him by serving him with the order of removal via two police officers, their misconduct during the termination process by failing to follow their own policies or procedures, and threatening him with financial losses if he chose not to quit or retire.

Defendant argues that Plaintiff cannot claim negligent infliction of emotional distress because he does not claim that he was in peril or bodily injury. Even if he could claim negligent infliction of emotional distress, all of the defendants would be immune pursuant to R.C. 2744.03. Defendant argues that Plaintiff has not made sufficient allegations in the complaint to pursue a claim of intentional infliction of emotional distress because that claim is strictly enforced in an employment context and Plaintiff has failed to allege that Defendants acted with actual malice in their actions.

Plaintiff in response argues that he claims that Defendants intentionally inflicted emotional distress upon him and that Defendants' actions were extreme and outrageous and failed to follow own policies of procedures. He claims that serving him with notice of the pre-disciplinary hearing via two police officers demonstrated actual malice and constituted outrageous conduct. Plaintiff also alleges that Defendants acted "outrageously" when they violated various requirements of civil service statutes.

As Plaintiff asserts that his claim in Count Two of the Complaint is for intentional infliction of emotional distress. As such, the Court will limit its analysis to intentional acts by Defendants.

Plaintiff needs to demonstrate that "(1) the defendant intended to cause emotional distress or knew or should have known that its conduct would result in serious emotional distress to the plaintiff; (2) defendant's conduct was outrageous and extreme and beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community; (3) defendant's conduct was the proximate cause of plaintiff's psychic injury; and (4) plaintiff's emotional distress was serious and of such a nature that no reasonable person could be expected to endure it." *Ritter v. Bd. Of Educ.*, 535 F.Supp.3d 690, 696 (N.D. OH 2021).

This is an "extremely high bar." *Id.* "Ohio courts place 'a particularly high bar on 'extreme and outrageous' conduct in the employer-employee relationship.'" *Id.* In order to support a cause of action based on intentional infliction of emotional distress in an employment setting, the "employees must have 'by extreme and outrageous conduct intentionally or recklessly caused serious emotional distress'" to the Plaintiff. *Anthony v. TRW, Inc.*, 726 F.Supp. 175, 178. (N.D. OH 1989). "Generally, the facts must be such that upon hearing a recitation of those facts, an average member of the community would exclaim, 'Outrageous!'" *Spitulski v. Bd. of Educ. of the Toledo City Sch. Dist.*, 2018-Ohio-3984, ¶ 60 (6th Dist.).

Plaintiff's claims in his complaint do not meet the requisite level of "outrageous" for the claim to survive the motion to dismiss. The Sixth District analyzed other cases in the employee context that included employees being berated, interrogated, yelled at in front of others, threatening employees, and denied requests for attorney. *Id.* at ¶ 62-65.

Plaintiff merely claims he was harassed when he was served with his order of suspension and Defendants allegedly did not follow proper procedures to remove him from his position. Such conduct is not so outrageous or extreme to meet the pleading requirement for a claim of intentional infliction of emotional distress. The Court must grant the motion and dismiss the Second Cause of Action in the Complaint as Plaintiff has not demonstrated that Defendants acted with the requisite conduct to sustain such a claim.

Defamation

Plaintiff's complaint alleges that Defendants committed defamation against him in the report from the investigators that states that he intentionally overpaid and underpaid the alleged victim based upon the inference that Plaintiff was in charge of determining that the time sheets were correct. Plaintiff claims that these claims are "false and defamatory, subjecting him to damage

to his reputation, exposing him to public contempt, ridicule, shame and disgrace and adversely affecting him in his profession." This false information was made public to news outlets and other employees despite Defendants knowing that Plaintiff "prevailed" on the victim's CPO claims.

Paragraph 58 of the amended complaint states "The City's claims for removal of Plaintiff from office as the Fire Chief for financial misconduct and sexual harassment made to news media outlets and other City employees and Fire Department members, when the individual Defendants were fully aware that the sexual harassment claims had been duly tried in the Ottawa County Common Pleas Court and rejected by the Judge sitting by assignment, were made intentionally, recklessly, with actual knowledge of their falsity and with actual malice."

"'To establish defamation, the plaintiff must show (1) that a false statement of fact was made, (2) that the statement was defamatory, (3) that the statement was published, (4) that the plaintiff suffered injury as a proximate result of the publication, and (5) that the defendant acted with the requisite degree of fault in publishing the statement.'" *Baker v. Lifeline Field Mktg., LLC*, 2017-Ohio-5675, ¶ 24 (6th Dist.), quoting *Dickinson v. Spieldenner*, 2017-Ohio-667, ¶ 14 (6th Dist.). A public figure may only recover for damages for a defamatory statement when the falsehood relating to his official conduct if he or she can prove that the defendant acted with actual malice. *Woods v. Capital Univ.*, 2009-Ohio-5672, ¶ 33 (10th Dist.).

Defendants in their motion argue that Plaintiff's claim for defamation claim fails because he only alleges that the investigator made the false allegation, not the named Defendants.

Plaintiff in response argues his complaint includes the allegation that the report was made available to news media and other employees. He argues that he makes allegations that actual malice existed when he alleged that Plaintiff was threatened with financial harm and that he alleged that the individual defendants proximately caused damages to plaintiff.

In their reply, Defendants argue that to meet the requirement to demonstrate actual malice as Plaintiff needed to claim that the individual Defendants intentionally acted and not the City as a whole.

The Court finds that Plaintiff has not made sufficient allegations that the individual Defendants published the defamatory information and Plaintiff has not alleged that the Defendants acted with actual malice when they informed others of the official actions that they were undertaking. As such, the Complaint's Third Cause of Action is hereby dismissed with prejudice.

Violations of Rights under Ohio Constitution

In his Fourth cause of action in the complaint, Plaintiff alleges that Defendants deprived Plaintiff of a property interest and deprived him of his procedural due process rights guaranteed by the Ohio Constitution.

Defendants argue that this cause of action should be dismissed because there is no private right of action for due process violations under Ohio Constitution Article I, § 16. The Ohio Supreme Court has held "that public employees do not have a private cause of civil action against their employer to redress alleged violations by their employer of policies embodied in the Ohio Constitution when it is determined that there are other reasonably satisfactory remedies provided by statutory enactment and administrative process." *Provens v. Stark Cty. Bd. of Mental Retardation & Dev. Disabilities*, 1992-Ohio-35; *see also Autumn Care Ctr., Inc. v. Todd*, 2014-Ohio-5235, ¶ 14 (5th Dist.)(finding that Art. I, § 16 of the Ohio Constitution is not self-executing and therefore there are no private causes of action to remedy violations of the section). The Supreme Court has also found that R.C. 124.34 and the appeals provided therein provide an adequate remedy to public employees. *State ex rel. Turner v. Houk*, 2007-Ohio-814, ¶ 9.

Plaintiff does not directly address these arguments of Defendants but rather points to *Washington v. City of Cincinnati*, 2024 U.S. Dist. LEXIS 421488 (S.D. Ohio Feb. 7, 2024) in his Complaint. In that matter, although the District Court determined that the plaintiff in that matter had a property interest in their position of the fire chief, the court did not directly address whether there was a private cause of action to enforce this provision in the Ohio Constitution. As Defendants have pointed however, the District Court's decision is contradictory to several other cases in the same district. *See Kerr v. Hurd*, 694 F.Supp.2d 817, 835 (S.D. Ohio 2010); *Sawyer v. Jeff Schmitt Auto Grp.*, 2015 U.S. Dist. LEXIS 19404 (S.D. Ohio 2015).

Plaintiff in his opposition asserts that *Riverside v. State*, 2014-Ohio-1974 (2d Dist.) supports his position and argues that summary judgment is the proper process to resolve an action for declaratory judgment rather than a motion to dismiss. However, the Second District clearly stated that it was reviewing the plaintiff's arguments as a claim that a statute is unconstitutional, not bringing a private right of action to recover a judgment against a political entity. *Id.* at ¶ 38. The Court therefore finds *Riverside* inapplicable to the matter at hand.

As there is no private right of action to bring a violation of Art I, § 16 of the Ohio Constitution, the Court hereby dismisses the Fourth Cause of Action in the Complaint with prejudice.

Wrongful Termination

Plaintiff's Complaint then contends that he was wrongfully terminated as procedures concerning the pre-disciplinary hearing were violated, no evidence was presented at the hearing, and no report from BCI had been received before he was terminated.

In their motion, Defendants argue that Plaintiff held his position pursuant to statute rather than according to contract. Defendants further argue a classified civil service employee cannot

bring a common law wrongful termination claim unless it is a claim for wrongful discharge in violation of public policy.

Plaintiff does not address any of these arguments or claims, but rather states "Most certainly, construing the allegations in the complaint as true and making all reasonable inferences which can be made from those allegations, defendants' Civ.R. 12(C) motion must fail, as plaintiff can indeed prove that he was wrongfully terminated."

"As a general rule, Ohio follows the doctrine of employment at-will." *Haven v. Village of Lodi*, 2022-Ohio-3957, ¶ 8 (9th Dist.). An exception was carved out of this general rule when "'[p]ublic policy warrants an exception to the employment-at-will doctrine when an employee is discharged for disciplined for a reason which is prohibited by statute.'" *Id.*, quoting *Greely v. Miami Maintenance Contrs., Inc.*, 49 Ohio St.3d 228 (1990). Such an action may only be brought by an at-will employee. *Id.* at ¶ 9. The employment relationship between a governmental employee and their employer is exclusively governed by statute or legislative enactment. *Id.* at ¶ 10, citing *Evans v. Shanee Twp. Bd. of Trustees*, 2021-Ohio-1003, ¶ 9 (3rd Dist.). R.C. 737.22 provides that every village with a fire department "shall have a fire chief as the department head, appointed by the mayor with the advice and consent of the legislative authority of the village, who shall continue in office until removed from office as provided by sections 733.35 to 733.39 of the Revised Code." R.C. 733.35 to 733.39 provides certain procedures to remove the fire chief and for what reasons. The mayor may only remove the fire chief under certain circumstances under R.C. 733.35.

Based on the allegations in the Complaint, and the complete lack of allegation regarding Plaintiff's status with the city as an at-will employee, the Court must find that Plaintiff has failed to sufficiently plead a claim for wrongful termination. Plaintiff makes no allegations that his termination was in contradiction of a public policy and as Defendants point out, there are statutory

remedies for Plaintiff to follow. As there are statutory remedies, there is no policy at jeopardy and therefore a claim for wrongful termination cannot stand. *Leininger v. Pioneer Nat'l Latex*, 2007-Ohio-4921, ¶ 27 ("it is unnecessary to recognize a common-law claim when remedy provisions are an essential part of the statutes upon which the plaintiff depends for the public policy claim and when those remedies adequately protect society's interests by discouraging the wrongful conduct."). As such, the motion to dismiss is granted as well and the Fifth Cause of Action of the Complaint is hereby dismissed with prejudice.

Retaliation

Plaintiff's final claim alleges that Shenker requested an investigation by the Bureau of Criminal Investigation for theft in office for receiving an annual training stipend given to firefighters who attend a certain percentage of weekly training sessions during the course of the year. Plaintiff claims that he was told by City employees to include himself on the list as he met the requirements for the stipend and that Colston reviewed and approved the stipend recipients before payment was made. Plaintiff alleges that the referral of theft in office charges was done maliciously, intentionally, willfully, and wrongfully and in retaliation for his assortment asserting his rights against the Defendants.

Defendants claim that their right to report a crime to police is absolutely privileged against civil liability for statements that were made and bear a reasonable relation to the activity reported. Plaintiff in his opposition does not address the Defendants' arguments regarding Plaintiff's retaliation claims.

Ohio does not recognize a common law claim of retaliation. To the extent that Plaintiff argues that his claim is a common law claim for retaliation, the Southern District Court of Ohio found: "[Plaintiff] bases his common law retaliation claim on the common-law cause of action

created by the Ohio Supreme Court in *Greely v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St.3d 228 (1990). *Greely* provides for a cause of action for wrongful discharge in violation of public policy. However, a claim for retaliation in violation of Ohio common law has not been expressly recognized by any court in Ohio. . . [The Plaintiff] identifies two Ohio Second District Court of Appeals cases . . . for the proposition that Ohio recognizes a common law cause of action for retaliation based upon *Greely*. However, this Court has not adopted the reasoning of *Davenport* nor *Edwards* have other Ohio appellate courts. Further, the *Greely* decision itself makes no mention of a common law claim for retaliation; it establishes a common law claim for wrongful termination in violation of Ohio public policy." *Lawrence v. Booz Allen Hamilton, Inc.*, 2014 U.S. Dist. LEXIS 85859 (S.D. Ohio 2014).

As Ohio does not recognize a common law claim for retaliation, the Court must also grant the motion to dismiss on this basis as well.

Governmental Immunity

As the Court has determined that the matter should properly be dismissed, the Court will not address the question of whether the individual Defendants are immune from suit.

Motion to Deem Requests for Admission

Plaintiff's motion to deem requests for admission be deemed admitted filed on May 28, 2024 is hereby deemed moot.

Motion to Disqualify

On February 29, 2024, Defendants filed a motion to disqualify Attorney Mark Smith, Attorney John Coppeler, and the law firm of Fylnn, Py & Kruse Co., L.P.A. from the suit. Plaintiff opposed this motion on April 5, 2024. Defendants filed their reply on April 11, 2024.

The Court finds that this motion is hereby moot as the matter has been dismissed with prejudice.

JUDGMENT ENTRY

Defendants' motion to dismiss is hereby found well-taken and is **GRANTED.** Plaintiff's complaint is hereby **DISMISSED WITH PREJUDICE.** Plaintiff's motion to deem requests for admission be deemed admitted is hereby **DEEMED MOOT.** Defendants' request to disqualify is hereby **DEEMED MOOT.**

JUDGE ROBERT G. CHRISTIANSEN