

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

AMY WELLIVER,  
Plaintiff,  
  
vs.  
  
AARON KESSLER, INDIVIDUALLY  
and d/b/a AK WELDING, LLC,  
Defendants.

: No. CV-19-1227  
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:  
: Civil Action – Law  
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:  
: *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 Amy Welliver's ("Plaintiff") Second Amended Complaint, Plaintiff began working for Defendant Aaron Kessler ("Defendant"), d/b/a AK Welding, LLC (collectively "Defendants") as a certified welder some time in 2011. In addition to her role as welder, Plaintiff performed duties for the company involving payroll, invoicing, business records, and human resources. Sometime in May of 2019, Defendant told Plaintiff that she was to withhold the paycheck of her fellow employee, Paul Temple, due to alleged damages to property. On or about May 13, 2019, Paul Temple was notified that he would not be paid due to alleged damages to property and "personal domestic issues."<sup>1</sup> Paul Temple went to speak with Defendant's brother, Tony Kessler, also an AK Welding employee, regarding his pay. Their conversation escalated to an argument when Tony Kessler struck Paul Temple on the back of the head with a pipe, causing fractures to Plaintiff's C5 and C6 cervical discs. Plaintiff was not present at the time of the assault, but learned of the incident via a text sent by a fellow employee. Plaintiff then immediately drove to her place of employment and encountered State Police at the scene.

The following day, Plaintiff arrived at work and personally met with Defendant. Defendant informed Plaintiff that the "cameras are erased" and stated that the "police don't need to know that the camera is backed up in the cloud." Defendant told Plaintiff

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<sup>1</sup> The Court notes that the Second Amended Complaint is not specific about the substance of these domestic issues.

that if she was not with him in “taking [Paul Temple] down” then she was “out.” Defendant threatened Plaintiff to keep her mouth shut or he would “make sure” that she did. Plaintiff said she would not lie to State Police. Defendant then terminated Plaintiff.

Within her Second Amended Complaint, filed March 10, 2020, Plaintiff raises two counts. Under Count I – Wrongful Termination, Plaintiff asserts that she was subject to wrongful termination in violation of public policy because she would not lie to State Police regarding Tony Kessler’s assault of Paul Temple in the workplace. Alternately, Plaintiff alleges that she was subject to wrongful termination because she questioned various illegal activities of Defendant and Tony Kessler and reported those activities to her employer.<sup>2</sup>

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 her claim under Count I for wrongful termination. Plaintiff further objects that Plaintiff has raised a violation of the Pennsylvania Whistleblower Law (“Act”), 43 P.S. § 1421, *et seq.*, which is inapplicable in this case as Defendant AK Welding, LLC is not an employer as defined by the Act.<sup>3</sup> Defendants’ Second Preliminary Objection objects that Plaintiff’s

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<sup>2</sup> 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 her termination that she knew Defendant and Tony Kessler were involved in illegal activity.

<sup>3</sup> Employers within the scope of the Pennsylvania Whistleblower Law include: “A public body or any of the following which receives money from a public body to perform work or provide services relative to the performance of work for or the provision of services to a public body: (1) An individual. (2) A partnership. (3) An association. (4) A corporation for profit. (5) A corporation not for profit.” A “Public Body “ is defined as: “All of the following: (1) A State officer, agency, department, division, bureau, board, commission, council, authority or other body in the executive branch of State government. (1.1) The General Assembly and its agencies. (2) A county, city, township, regional governing body, council, school district, special

Count II claim for punitive damages fails to plead with specificity the legal and factual basis for her 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 provisions 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 her 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 her claim for wrongful termination. Plaintiff asserts that because she would not lie to police about a criminal assault in the workplace, Plaintiff's termination violated Article I, Section 1 of the Pennsylvania Constitution, which protects a citizen's liberty and happiness.<sup>4</sup> Plaintiff notes that the courts have interpreted Article I, Section 1 as protecting the right of a workman to work without hindrance of others.<sup>5</sup> Plaintiff further asserts that Defendant violated criminal statute 18 Pa.C.S.A. § 4957, Protection of Employment of Crime Victims, Family Member 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 her employer violated criminal statute 18 Pa.C.S.A. § 4953,

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district or municipal corporation, or a board, department, commission, council or agency. (3) Any other body which is created by Commonwealth or political subdivision authority or which is funded in any amount by or through Commonwealth or political subdivision authority or a member or employee of that body." 43 P.S. § 1422.

<sup>4</sup> 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.").

<sup>5</sup> See *Erdman v. Mitchell*, 56 A, 327 (Pa. 1903).

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.” Plaintiff also cites criminal statute 18 Pa.C.S.A. § 4952, Intimidation of Witnesses or Victims, which holds in relevant part that:

- a. A person commits an offense if, with the intent to or with the knowledge that his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice, he intimidates or attempts to intimidate any witness or victim to:
  - (1) Refrain from informing or reporting to any law enforcement officer, prosecuting official or judge concerning any information, document or thing relating to the commission of a crime.
  - (2) Give any false or misleading information or testimony relating to the commission of any crime to any law enforcement officer, prosecuting official or judge.
  - (3) Withhold any testimony, information, document or thing relating to the commission of a crime from any law enforcement officer, prosecuting official or judge.

Plaintiff further cites 18 P.S. § 11.102, Legislative Intent, of the Crime Victim’s Act, which states that there is a “civic and moral duty of victims of crime to fully and voluntarily cooperate with law enforcement and prosecutorial agencies,” emphasizing that “all victims of crime are to be treated with dignity, respect, courtesy and sensitivity.” Finally, Plaintiff asserts that her discharge was a wrongful violation of the Pennsylvania Whistleblower Law.

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.<sup>6</sup> An at-will employee may be terminated at any time, for any reason, subject to limited exceptions.<sup>7</sup> “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

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<sup>6</sup> See *McLaughlin v. Gastrointestinal Specialists, Inc.*, 750 A.2d 283, 186-87 (Pa. 2000).

<sup>7</sup> *Id.* at 286.

public policy.”<sup>8</sup>

To justify the application of the public policy exception, the employee must point to a clear public policy articulated in the constitution, statutes, 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.<sup>9</sup>

“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.”<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> In *Reuther v. Fowler & Williams, Inc.*, the Superior Court found a clear violation of public policy where the employee was terminated after reporting for

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<sup>8</sup> *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)).

<sup>9</sup> *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)).

<sup>10</sup> *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)).

<sup>11</sup> *Krajsa v. Keypunch, Inc.*, 622 A.2d 355, 359 (Pa. Super. 1993).

<sup>12</sup> See *Field v. Phila. Elec. Co.*, 565 A.2d 1170 (Pa. Super. 1989).

<sup>13</sup> See *Hunter v. Port Authority*, 419 A.2d 631 (Pa. Super. 1980).

jury duty.<sup>14,15</sup>

In contrast, the Superior Court in *Krajsa* found no violation of a clear mandate of 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.<sup>16</sup> 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.<sup>17</sup> 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.

*Krajsa* clearly establishes that the Pennsylvania Whistleblower Law will not support a common law wrongful discharge claim for an employee who does not fall within the scope of the Act. Employees that do fall within the scope of the Pennsylvania Whistleblower Law must sue under the Act.<sup>18</sup> Further, the Court finds that Plaintiff’s claim does not fall within the scope of section 4957(a), as nothing within the pleadings suggest that Plaintiff was discharged due to a court appearance.<sup>19</sup> Additionally, the Court finds the nexus between Plaintiff’s claim of wrongful discharge for refusing to lie to State Police or, alternately, for questioning the purported illegal activities of Tony

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<sup>14</sup> *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119 (Pa. Super. 1978).

<sup>15</sup> More recent cases identifying a termination in violation of a clear mandate of public policy are listed 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)[.]”).

<sup>16</sup> *Krajsa*, 622 A.2d at 360.

<sup>17</sup> *McLaughlin*, 750 A.2d at 289-300.

<sup>18</sup> *Freeman v. McKellar*, 795 F. Supp. 733, 742 (E.D. Pa. 1992) (“A cause of action for wrongful discharge, however, may be maintained only in the absence of a statutory remedy for an aggrieved employee.”) (citing *Darlington v. General Electric*, 208, 504 A.2d 306 (Pa. Super. 1986)).

<sup>19</sup> Plaintiff has cited *Freeman v. McKellar* 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.

Kessler and Defendants, too nebulously connected to her liberty rights under Article I, Section 1 of the Pennsylvania Constitution to establish a violation of a clear mandate of public policy.<sup>20</sup>

However, as noted above, a court will find a wrongful discharge in instances where the employer discharged the employee for refusing to commit a crime.<sup>21</sup> Pursuant to the facts averred in the Second Amended Complaint, Defendant instructed Plaintiff to lie to State Police about Tony Kessler's assault upon Paul Temple so as to incriminate Paul Temple. Such conduct would constitute the crime of intimidation of victims pursuant to Pa.C.S.A. § 4952(a). Additionally Pa.C.S.A. § 4953(a) is also applicable. In this instance, the "unlawful act" is Defendant ordering Plaintiff, a witness to a crime, to lie to State police. The "harm" is Plaintiff's subsequent termination.<sup>22</sup> Therefore, the Court finds that Plaintiff has established a violation of a clear mandate of public policy supportive of her wrongful termination claim. However, the Court does not find 18 P.S. § 11.102 supportive of Plaintiff's wrongful termination claim, as this provision was enacted decades after section 4952(a) and section 4953(a), and so cannot be reasonably interpreted as clarifying the legislature's intent in enacting those sections.

Therefore, Defendants' First Preliminary Objection is SUSTAINED IN PART. Specifically, the Court finds that 18 Pa.C.S.A. § 4957(a), Article I, Section 1 of the Pennsylvania Constitution, the Pennsylvania Whistleblower Law, and 18 P.S. § 11.102 are not supportive of Plaintiff's wrongful termination claim. References to these statutes should therefore be STRICKEN. However, the Court finds that in citing Pa.C.S.A. § 4952(a) and 18 Pa.C.S.A. § 4953(a), Plaintiff has properly identified a clear mandate of

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<sup>20</sup> 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.

<sup>21</sup> See *Donahue v. Fed. Exp. Corp.*, 753 A.2d 238, 244 (Pa. Super. 2000) (citing *Spierling v. First Am. Home Health Servs., Inc.*, 737 A.2d 1250, 1252 (Pa. Super. 1999); *Hennessy v. Santiago*, 708 A.2d 1269, 1273 (Pa. Super. 1998)).

<sup>22</sup> Indeed, the Eastern District Court of Pennsylvania found in a situation where an employer threatened an employee against providing truthful testimony before the grand jury, and then fired the employee for providing such truthful testimony, that there was a clear violation of public policy under both Pa.C.S.A. § 4952(a) and Pa.C.S.A. § 4953(a). See *Freeman*, 795 F. Supp. at 742. However, the Court notes that, if taken alone, Defendant's alleged threats towards Plaintiff would be insufficient to constitute "harm" as provided in the statute. See *Com. v. Ostrosky*, 909 A.2d 1224, 1232 (Pa. 2006) (holding that the "repeated course of conduct" language within 18 Pa.C.S.A. § 4953(a) would be rendered redundant if a single threat or incident of verbal threats could constitute "harm").

public policy supportive of her wrongful termination claim.

The Court next addresses whether Plaintiff has sufficiently pled her claim for punitive damages.<sup>23</sup> The Court first notes that Plaintiff has plead her claim for punitive damages as a separate count, which is technically improper, as punitive damages are not a separate cause of action.<sup>24</sup> The punitive damages claim shall therefore be subject to dismissal pursuant to Pa.R.C.P. 1028(a)(4), allowing dismissal 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, the 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.<sup>25</sup>

IT IS SO ORDERED this 7<sup>th</sup> day of July 2020.

By The Court,

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Eric R. Linhardt, Judge

ERL/cp

cc:

Michael J. Zicoello, Esq.

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<sup>23</sup> Pa.R.C.P. 1028(a)(3) (permitting preliminary objections for insufficient specificity in pleading).

<sup>24</sup> See *Blair v. Mehta*, No. 03-00954, 2004 WL 5868007 (Lyco. Cty. Sep. 10, 2004).

<sup>25</sup> The Court shall permit Plaintiff to refile, even though she 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 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).



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