

{¶ 3} As a preliminary matter, both plaintiff's May 23, and July 6, 2005, motions for leave are hereby GRANTED, instanter.

{¶ 4} Upon review of the pending motions, the court finds for the following reasons that defendant's motion to dismiss plaintiff's R.C. 4113.52 claim must be granted, but that plaintiff is entitled to amend the pleadings to assert such claim as a common-law tort claim in conformance with the evidence presented at trial. However, the court finds that, even though plaintiff may assert the common-law claim, judgment cannot be granted in his favor on that cause of action.

{¶ 5} This court's jurisdiction is established by the Court of Claims Act, R.C. Chapter 2743, effective January 1, 1975.

{¶ 6} R.C. 2743.02(A)(1) provides, in pertinent part, that:

{¶ 7} "The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties ***. To the extent that the state has previously consented to be sued, this chapter has no applicability."

{¶ 8} In its motion to dismiss, defendant contends that, notwithstanding R.C. 2743.02, Section (D) of R.C. 4113.52 and 124.341, provide that whistleblower claims are to be brought, respectively, in the courts of common pleas or before the State Personnel Board of Review (SPBR).

{¶ 9} R.C. 4113.52(D) provides, in pertinent part, that:

{¶ 10} "If an employer¹ takes any disciplinary or retaliatory action against an employee as a result of the employee's having filed a report under division (A) of this section, the employee may bring a civil action for appropriate injunctive relief or for the remedies set forth in division (E) of this section, or both, *** *in a court of common pleas in accordance with the Rules of Civil Procedure.*" (Emphasis added.)

{¶ 11} This section concludes:

{¶ 12} "A civil action under this division is not available to an employee as a remedy for any disciplinary or retaliatory action taken by an appointing authority against the employee as a result of the employee's having filed a report under division (A) of section 124.341 [124.34.1] of the Revised Code."

{¶ 13} R.C.4113.52 applies to private employees generally, but includes state employees in its definition. R.C. 124.341, often referred to as "the state employee whistleblower statute," applies to classified and unclassified state employees. The remedy provided under that statute is set forth, in pertinent part, under section(D), as follows:

{¶ 14} "If an appointing authority takes any disciplinary or retaliatory action against a classified or unclassified employee as a result of the employee's having filed a report under division (A) ***, *the employee's sole and exclusive remedy, notwithstanding any other provision of law, is to file an appeal with the state personnel board of review ***.*" (Emphasis added.)

{¶ 15} In the instant case, it is undisputed that plaintiff was a Career Professional Employee governed by R.C. 5501.20 et.

¹The definition of "employer" under R.C. 4113.51(B) includes "the state or any agency or instrumentality of the state ***."

seq. The position defined therein, while neither classified nor unclassified for reasons that will be discussed infra, was more in the nature of classified employment. As such, it would appear that both R.C. 124.341 and 4113.52 may apply. In discussing application of those statutory definitions, the Tenth District Court of Appeals noted that: "*** while each section provides a separate statutory remedy to terminated employees, provisions in each nonetheless prevent an employee from pursuing remedies under both." *Robins v. Ohio Department of Liquor Control* (June 25, 1996), Franklin App. No. 96APE01-38. Thus, "[b]ecause R.C. 4113.52 covers state employees and areas not covered by R.C. 124.341, the nature of the 'wrongdoing' reported is dispositive." *Id.* It is defendant's position that, based upon the nature of the wrongdoing reported by plaintiff, i.e., misuse of state funds that he reasonably believed could constitute felonious conduct, plaintiff's sole and exclusive remedy was with the SPBR.

{¶ 16} In response to defendant's arguments, plaintiff maintains that, based upon the language in R.C. 2743.02(A), "to the extent that the state has previously consented to be sued, this chapter has no applicability," this court's jurisdiction extends to all statutory claims that were enacted after 1975, when the Court of Claims came into being. R.C. 4113.52 was not enacted until 1988. Plaintiff notes that this court has subject matter jurisdiction over age discrimination claims brought pursuant to R.C. 4101.17 which was amended in 1979, and pursuant to R.C. Chapter 4112.02 which was enacted that same year. In addition, plaintiff maintains that because the Court of Claims has exclusive, original jurisdiction in all civil suits for money damages, even where ancillary relief such as an injunction or a declaratory

judgment is sought, his claim for compensatory damages and for equitable and injunctive relief is properly brought in this court.

{¶ 17} In further support of his arguments, plaintiff references the oft-quoted language of *Friedman v. Johnson* (1985), 18 Ohio St.3d 85, 87-88, wherein the Supreme Court of Ohio held that: "[a] major purpose of the Court of Claims Act was to centralize the filing and adjudication of all claims against the state. *** the exceptions to its exclusive jurisdiction should be strict and narrow."

{¶ 18} The parties' analysis of the issues is not new. However, the court finds that resolution of the matter is more fundamental. Specifically, R.C. Chapter 2743 was enacted to carry into effect an amendment to Ohio's constitution that permitted the abolishment of the defense of governmental immunity and gave to the General Assembly the authority to determine in what courts and in what manner suits may be brought against the state. See *Raudabaugh v. State* (1917), 96 Ohio St. 513, *Krause v. State* (1972), 31 Ohio St.2d 132. The statute did not create any new causes of action against the state; rather, it placed the state upon the same level as any private party. *McCord v. Ohio Division of Parks & Recreation* (1978), 54 Ohio St.2d 72, 74. Thus, if a suit may now be brought against a private party, it may generally be brought against the state; for example, negligence and intentional tort actions, medical malpractice, premises liability, defamation, breach of contract claims, construction claims, and employment actions. Because money damages are cognizable in such actions, the Court of Claims is a convenient forum in which to centralize such filings and adjudications.

{¶ 19} While the Court of Claims is a convenient forum for many purposes, it is not the sole forum. As stated in R.C. 2743.02(A)(1), the state had previously consented to be sued in other forums. Thus, as new statutory causes of action arise, the legislature clearly has authority to determine in what courts and in what manner those suits may be brought against the state. In this case, R.C. 4113.52 and 124.341 expressly create a right of action against the state for whistleblower protection claims and limit the jurisdiction over such suits to the courts of common pleas or the SPBR. It is not germane for the purposes of this decision to determine which of those two forums might have been the appropriate one for the filing of plaintiff's claim. It is sufficient that the legislature has determined that it is not the Court of Claims. Accordingly, defendant's motion to dismiss plaintiff's whistleblower claim for lack of subject matter jurisdiction shall be granted.

{¶ 20} Although the judgment on plaintiff's whistleblower claim cannot stand, the court finds plaintiff's motion to amend the pleadings to conform to the evidence to be well-taken. Therefore, the motion shall be granted and the pleadings shall be amended to assert a common-law tort claim of wrongful discharge in violation of public policy.

{¶ 21} Civ.R. 15(B), "Amendments to conform to the evidence," provides in pertinent part that:

{¶ 22} "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to

conform to the evidence and to raise these issues *may be made upon motion of any party at any time, even after judgment. ***.*"

{¶ 23} "It is axiomatic that cases are to be decided on the issues actually litigated at trial. Although Civ. R. 15 allows for liberal amendment of the pleadings toward that end, the rule will only apply when, as stated therein, the amendment would 'conform to the evidence' and when the issue is tried by either the 'express or implied consent of the parties.'" *State ex rel. Evans v. Bainbridge Township Trustees* (1983), 5 Ohio St.3d 41, 44.

{¶ 24} In the instant case, the court finds that both the language of Civ.R. 15(B) and the case law relevant thereto favor allowance of the amendment under the circumstances of this case. Although the elements of the whistleblower claim and those of the common-law tort claim are somewhat distinct, the proof required to establish the claims is virtually identical. This case has been fully tried on its merits. Even though the court cannot enter judgment in favor of plaintiff on the common-law claim, it is in the interests of fairness and judicial economy that the case be resolved on its merits rather than through adherence to "procedural niceties." See *Hall v. Bunn* (1984), 11 Ohio St.3d 118, 121.

{¶ 25} Accordingly, the court concludes that the amendment will allow the pleadings to conform to the evidence presented at trial; that the common-law tort claim was tried by implied consent of the parties; and that neither party will be substantially prejudiced by allowance of the same.

{¶ 26} For the reasons that follow, the court finds that plaintiff's claim of wrongful termination in violation of public policy must fail.

{¶ 27} In *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 1997-Ohio-219, at paragraph two of the syllabus, the Supreme Court of Ohio held that:

{¶ 28} "R.C. 4113.52 does not preempt a common-law cause of action against an employer who discharges or disciplines an employee in violation of that statute."

{¶ 29} Further, the court held that "[a]n *at-will* employee who is *discharged or disciplined* in violation of the public policy embodied in R.C. 4113.52 may maintain a common-law cause of action against the employer pursuant to *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St. 3d 228, 551 N.E.2d 981, and its progeny, so long as that employee had fully complied with the statute and was subsequently *discharged or disciplined*." *Id.* at paragraph 3 of the syllabus. (Additional citations omitted.) (Emphasis added.)

{¶ 30} In this case, the court found in its March 23, 2005, decision that plaintiff had fully complied with the requirements of the whistleblower statute. Thus, plaintiff was entitled to maintain a statutory cause of action for the violation, a common-law cause of action in tort, or both, but was not entitled to double recovery. *Kulch*, *supra*, at paragraph 5 of the syllabus. However, as stated previously, the parties do not dispute that plaintiff's status was that of a Career Professional Employee. The definition of that position evinces an intent to create a special employee designation that was not "at-will" (or unclassified), but which did not include all of the protections of classified civil service. Specifically, R.C. 5501.20(A)(1) states:

{¶ 31} "'Career professional service' means that part of the competitive classified service that consists of employees of the department of transportation ***."

{¶ 32} R.C. 5501.20(B) provides, in part, that: "Except as otherwise provided in this section, an employee in the career professional service is subject to the provisions of Chapter 124 of the Revised Code that govern employees in the classified civil service." The court finds no other provisions of the statute that would exempt plaintiff from being treated as an employee in the classified civil service.

{¶ 33} Because *Greeley*, supra, created the public-policy tort theory as an exception to Ohio's employment-at-will doctrine, it has been consistently held that in order to bring such cause of action, the employee must have been an employee-at-will. See *Greeley*, at 233-234, *Hayes v. Zoological Society of Cincinnati* (1995), 73 Ohio St.3d 254, 258. "The identifying characteristic of an employment-at-will relationship is that either the employer or the employee may terminate the employment relationship for any reason which is not contrary to law." Id. citing *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100; *Boggs v. Avon Products, Inc.* (1990), 56 Ohio App.3d 67.

{¶ 34} Here, plaintiff simply does not qualify as an employee-at-will. Rather, his employment relationship was governed by the terms of R.C. 5501.20. Section (C) of that statute states: "[t]he department shall give an employee whose performance is unsatisfactory an opportunity to improve performance for a period of at least six months, by means of a written corrective action plan, before the department takes any disciplinary action under this section or section 124.34 of the Revised Code." Section (D)

of the statute provides that a Career Professional Employee may appeal a discharge to the SPBR. Although plaintiff in this case was found to have been constructively discharged, that basis of "termination" was also appealable to the SPBR. *Kinney v. Ohio State Department of Administrative Services* (1984), 14 Ohio App.3d 33. Because defendant's power to terminate plaintiff was limited by statute, and plaintiff was afforded appeal rights, the court concludes that he falls outside the class of employees for whom *Greeley* provides protection. On this basis alone, plaintiff's common-law tort claim would be precluded.

{¶ 35} However, in addition to the lack of at-will employment status, the law is unclear as to whether plaintiff could maintain a cause of action based upon constructive discharge in violation of public policy. The language of *Greely, Kulch, et al.*, consistently defines the cause of action as one where plaintiff has been discharged or disciplined. Constructive discharge differs from those actions because it is not a per se action of the employer that is involved as much as it is the reaction of the employee to a particular, albeit intolerable, situation. See *Pennsylvania State Police v. Suders* (2004), 542 U.S. 129. Nevertheless, as defendant concedes in its memorandum contra plaintiff's motion to amend, at least one court has suggested that expansion of the claim to include constructive discharge is permissible.

{¶ 36} In *Hillman v. Safeco Insurance Company of America* (N.D. Ohio, 2002), 190 F.Supp. 2d 1029, 1039, the court stated in its conclusion that the *Kulch* requirement of proving actual discharge would be satisfied by showing constructive discharge. In *Hillman*, plaintiff had been unable to show that his employer's conduct forced him to resign involuntarily, thus, the issue was not further

addressed. Here, the court has found that plaintiff was clearly constructively discharged. Moreover, the court found that the conditions to which plaintiff was subjected were particularly egregious. However, even if the court were to allow this claim to include constructive discharge, it would nevertheless be defeated by the lack of employment-at-will status.

{¶ 37} Accordingly, for the reasons set forth above, the court finds that plaintiff has failed to prove a common-law tort claim of wrongful discharge in violation of public policy.

{¶ 38} In summary, defendant's motion to dismiss plaintiff's R.C. 4113.52 claim shall be granted; plaintiff's motion to amend the pleadings to assert a common-law tort claim in conformance with the evidence shall be granted; and the court's March 23, 2005, decision and judgment shall be vacated to the extent that plaintiff's R.C. 4113.52 whistleblower claim shall be dismissed and the pleadings shall be amended to assert a claim of wrongful discharge in violation of public policy. The court's March 23, 2005, judgment shall be amended to reflect that judgment shall be entered in favor of defendant on all claims asserted in plaintiff's original and amended complaints.

IN THE COURT OF CLAIMS OF OHIO

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LARRY R. DARGART	:	
Plaintiff	:	CASE NO. 2002-09668
v.	:	Judge Joseph T. Clark
	:	<u>JUDGMENT ENTRY</u>
OHIO DEPARTMENT OF	:	

TRANSPORTATION

Defendant

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This matter came before the court for determination of defendant's April 13, 2005, motion to dismiss plaintiff's R.C. 4113.52 claim for lack of subject matter jurisdiction and plaintiff's May 23, 2005, motion to amend the pleadings to assert a common-law tort claim of wrongful discharge in violation of public policy, in conformance with the evidence presented at trial.

For the reasons set forth in the decision filed concurrently herewith, defendant's motion to dismiss plaintiff's R.C. 4113.52 claim is GRANTED. Plaintiff's motion to amend the pleadings to assert a common-law tort claim in conformance with the evidence is GRANTED. The pleadings are hereby amended to assert a claim of wrongful discharge in violation of public policy.

This court's March 23, 2005, decision and judgment entry is amended to the extent that judgment on plaintiff's R.C. 4113.52 whistleblower claim is VACATED and that cause of action is DISMISSED.

This court's March 23, 2005, judgment entry is further amended such that judgment is rendered in favor of defendant on plaintiff's claim of wrongful discharge in violation of public policy. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

JOSEPH T. CLARK
Judge

Entry cc:

Terry J. Lodge
316 N. Michigan Street, Suite 520
Toledo, Ohio 43624-1627

Attorney for Plaintiff

Larry Y. Chan
Assistant Attorney General
150 East Gay Street, 23rd Floor
Columbus, Ohio 43215-3130

Attorneys for Defendant

Jack W. Decker
Assistant Attorney General
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215-3130

LH/cmd
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