IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TERESA L. O'MALLEY, Plaintiff,	:	Case No. 3:12-cv-326
v.	:	JUDGE WALTER H. RICE
NAPHCARE, INC. Defendant.	:	MAGISTRATE JUDGE MICHAEL J. NEWMAN

DECISION AND ENTRY SUSTAINING THE PARTIAL MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT OF DEFENDANT NAPHCARE, INC. (DOC. #24), AND SUSTAINING THE MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT OF DEFENDANTS JEFF McINTYRE AND KARINA CARLISLE (DOC. #33); PLAINTIFF'S CLAIM UNDER THE OHIO WHISTLEBLOWER'S PROTECTION ACT, OHIO REV. CODE § 4113.52 (COUNT ONE), AGAINST ALL DEFENDANTS IS DISMISSED WITH PREJUDICE; PLAINTIFF'S CLAIM UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT, 29 U.S.C. § 623 (COUNT FOUR), AGAINST DEFENDANTS McINTYRE AND CARLISLE ONLY IS DISMISSED WITH PREJUDICE; ALL OTHER CLAIMS AGAINST ALL DEFENDANTS ARE DISMISSED WITHOUT PREJUDICE; PLAINTIFF GRANTED LEAVE TO AMEND COMPLAINT WITHIN TWENTY (20) CALENDAR DAYS TO REPLEAD CLAIMS DISMISSED WITHOUT PREJUDICE; ALL AMENDMENTS MUST TAKE INTO ACCOUNT THE STRICTURES OF RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Plaintiff Teresa L. O'Malley ("O'Malley" or "Plaintiff") brings this action against her former employer, Defendant NaphCare, Inc. ("NaphCare"), and three of

its employees, Jeff McIntyre ("McIntyre"), Karina Carlisle ("Carlisle"), and Gary Blair ("Blair"). O'Malley's Second Amended Complaint (Doc. #29) alleges wrongful termination under the Ohio Whistleblower's Protection Act ("OWPA"), Ohio Revised Code § 4113.52 (Count One), defamation (Count Two), intentional infliction of emotional distress (Count Three), discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623 (Count Four), a state common law claim for wrongful discharge in violation of public policy (Count Five), and a claim under 42 U.S.C. § 1983 alleging retaliation for exercising her First Amendment rights (Count Six). The Court has federal question jurisdiction, pursuant to 28 U.S.C. § 1331, over O'Malley's federal claims. The Court has supplemental jurisdiction over her state law claims pursuant to 28 U.S.C. § 1367.

Pending before the Court are Defendant NaphCare, Inc.'s Partial Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. #24), which moves for dismissal of all of Plaintiff's claims except the ADEA claim for age discrimination, and Defendants Jeff McIntyre and Karina Carlisle's Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. #33), which moves the Court to dismiss all claims against them. For the reasons set forth below, the Court SUSTAINS Defendants' motions.

I. FACTUAL ALLEGATIONS[1]

Defendant NaphCare provides comprehensive healthcare services, including physician and dental services, to correctional facilities. From 2007 until October of 2011, O'Malley worked for NaphCare as a Licensed Practical Nurse at the Montgomery County Jail in Dayton, Ohio. Defendant McIntyre was NaphCare's Assistant Vice President of Operations. Beginning in August, 2011, Defendant Carlisle began working for NaphCare as the Health Services Administrator at the jail. In late August or early September 2011, Defendant Blair began working for NaphCare as the jail's Director of Nursing. Doc. #29 at 1-3, 16.

Around the time that the events occurred surrounding O'Malley's discharge, the Ohio State Board of Nursing ("OSBN") and the Ohio State Board of Pharmacy ("OSBP") were examining the licensing of NaphCare's electronic medical records systems and its handling of medications. As a result, NaphCare was "in the process of making changes to meet the standards and requirements" of those organizations. *Id.* at 3.

In July of 2011, at McIntyre's direction, O'Malley uncovered a bed bug infestation while treating an inmate. McIntyre allowed O'Malley to call the local health department in order to deal with the situation. After speaking with a health

[1] The Court presents the facts as alleged by O'Malley in her Second Amended Complaint. Because NaphCare has moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted, the Court accepts the factual allegations in her Second Amended Complaint as true and draws all inferences in her favor. *See infra* Section III.

department official and receiving "instructions," McIntyre told O'Malley to "handle it." According to O'Malley, she did just that.[2]

Several days after the bed bug incident, McIntyre and health department inspector Captain Chuck Crosby performed "a follow up" at the jail. O'Malley asked Captain Crosby if she "had caused a problem by calling the [health department] for directions" to treat the bed bugs, and assured the inspector that McIntyre had given her permission to call the health department. Captain Crosby's only response was that "it was a required inspection" and that the health department was doing what was required. *Id.* at 5.

After Carlisle was appointed as NaphCare's new Health Services Administrator in August of 2011, McIntyre "directed" her to "create a supplemental bed bug policy" for NaphCare's manual, as a "direct result" of the health department inspection. The inspection itself resulted from O'Malley's previous call to the health department for instructions. According to O'Malley, the Montgomery County Jail requested that NaphCare create the policy in order to "satisfy" the health department. McIntyre told O'Malley that making NaphCare create the bed bug policy was "unusual and not customary," and that he knew "how we got stuck with it." O'Malley alleges that these comments, as well as others made by McIntyre and Carlisle, indicated that she was being blamed "for

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[2] O'Malley provides no factual detail regarding the inmate's health care issue that brought the bed bug problem to her attention, the directions she was provided by the health department, or what she actually did to "handle" the situation. Doc. #29 at 4-5.

the cost and trouble of having to produce an addition to Defendant NaphCare's manual." *Id.* at 5-6.

At the same meeting that Carlisle was announced as NaphCare's new Health Services Administrator, O'Malley raised several issues affecting "inmate and nursing safety" that concerned her, including staffing shortages, the recent removal of the electronics records system, and an unofficial change to the medication policy. In response, McIntyre asserted that matters were out of his hands and "too expensive to fix." As O'Malley continued to express her concerns, McIntyre became more irritated with her, admonished her to "just shut the 'f' up about it," glared at her, told her that she didn't know how to shut up, and said "[i]f I ever give a class on how to learn to shut the hell up, I will make sure to personally invite you, first." At that point, the meeting ended. *Id.* at 7-8.

In September of 2011, Cassandra Miles began employment in the position of an "as needed" nurse. On September 16, 2011, Miles "blurted out" to O'Malley: "Maybe if you are lucky enough to get unemployment, maybe you can go back to school." *Id.* at 8-9.

On September 29, 2011, O'Malley discovered irregularities while preparing the medication cart at the beginning of her shift. She found eight ounces of "loose medications" that she then placed in cups, as well as "medications that were not stored properly." According to O'Malley, she "was shaken by her findings" because the OSBN and the OSBP had been investigating NaphCare for several months, and the company was still trying to meet their compliance standards. She

ensured that the medication cart was arranged in a way that complied with OSBN and OSBP standards, and then reported the irregularities. *Id.* at 9-10.

After making the report, O'Malley was approached by Blair and Carlisle while on her rounds. Blair "yelled" at O'Malley to open the drawers of the cart, telling her to shut up. O'Malley complied. Carlisle then stated that they would speak with her "downstairs." However, when approached, Carlisle and Blair said there was "nothing to discuss." Carlisle "uttered a reference to the bed bug policy from her open office door." O'Malley alleges that another employee told her that Blair said, referencing O'Malley, "I am sick of her mouth, she better [sic] watch[,] she's gonna be out of here." *Id.* at 10-11.

On September 30, 2011, O'Malley worked the morning shift and was assigned as the "Charge Nurse." The Charge Nurse has "the dut[ies] of reconciling narcotics at shift change and assisting with [the] distribution of any medications needed by the nurses" from NaphCare's in-house pharmacy. On that particular day, a pharmacist contracted by NaphCare was on site to perform "a 'mock' survey."[3] Twice during the survey, Carlisle requested and then returned O'Malley's keys. The pharmacist, only known to O'Malley as "Mary," finished her survey and left by 1:00 P.M. *Id.* at 11.

[3] O'Malley provides no description of the pharmacist's activity other than this phrase. The Court infers that the pharmacist was there to perform some type of audit or compliance check of NaphCare's medication handling procedures.

An hour later, after receiving a personal phone call, O'Malley asked Blair for permission to leave work briefly for a personal errand. Blair refused. O'Malley then asked Carlisle instead, who acquiesced. *Id.* at 12.

After O'Malley returned, Carlisle and Blair called her into their office to inform her that they were going to send a report of missing narcotics to NaphCare's corporate office, based on a report from the pharmacist. Carlisle repeatedly asked O'Malley to provide them with "a letter on the matter" to send with the report. O'Malley asked for details about the missing narcotics, but her supervisors would not provide details. Carlisle and Blair refused to go to the pharmacy with O'Malley and count the medication, stating that they had just come from there. When O'Malley asked if they thought that she had taken the narcotics, Carlisle replied "only you know what happened." O'Malley was at a loss as to what to write in the letter that her supervisors requested, because "she had no idea of what [had] happened to a narcotic count that was reconciled at the beginning of the shift." *Id.* at 12-13.

O'Malley was upset. She was lightheaded and dizzy, and asked permission to leave for a short time, which Carlisle allowed. On her way out, she passed another nurse, and tossed her keys to him. When she returned, Blair called her back into the office and "repeatedly" instructed her on how to count narcotics. Blair also chastised O'Malley for leaving the building without permission, although Carlisle had given her permission. O'Malley left the office and called the medical director, Dr. Brenda Ellis, who stated that she had not received any notification of

missing narcotics. Carlisle eventually allowed O'Malley to write the letter regarding the missing narcotics over the weekend, when she would have more time to think about how to compose it. *Id.* at 14.

O'Malley was again assigned as Charge Nurse on October 1, 2011, and October 2, 2011. She had a 16 hour shift each day. On October 1, she searched for evidence of missing narcotics in the pharmacy, but could find "nothing that was unusual from her previous account." O'Malley "reconciled the morning count" with another nurse, who accused Carlisle of "making an example" out of O'Malley. At the end of her shift, O'Malley reconciled the medication she was responsible for, with no evidence of missing narcotics. During her shift the next day, she again attempted to unearth some evidence of missing narcotics by searching the pharmacy and its books, but found nothing. *Id.* at 15-16.

The next (and last) day that O'Malley worked was October 5, 2011. Around 8:00 A.M., O'Malley was summoned to Carlisle and Blair's office, where Carlisle told her that she was being terminated. She was given a "discharge summary" and asked to sign it. O'Malley briefly left the office to make a copy of the document, then returned it, unsigned, to Carlisle. *Id.* at 16.

After meeting with Blair and Carlisle, O'Malley went back to the medical area and asked which nurse "was going to count the narcotics on the cart so that she [could] leave." As O'Malley and another nurse began to perform the count, Blair emerged from the office and informed O'Malley that he would take her keys and perform the narcotics count for her. O'Malley demurred, and Blair

"aggressively ordered" her to return to the office. When O'Malley tried to refuse, stating that her "business was finished and she was going to leave now," she was "directed" back to the office. Once inside, Blair and Carlisle told O'Malley that she was a good nurse, and wished her luck. *Id.* at 16-17.

Blair insisted on accompanying O'Malley as she exited the medical area with Sergeant Jackson, an officer from the jail, in spite of Jackson's protestation that it wasn't necessary for Blair to come with them. O'Malley asked Jackson not to leave her alone with Blair. Once outside, O'Malley spoke to another officer, Captain Roy. She asked if he had heard about any investigation or report about missing narcotics, but he had not. O'Malley made later inquiries with the Sherriff's office as well, but was provided no confirmation of any report of missing narcotics. *Id.* at 18.

After her discharge, O'Malley received "phone calls and inquiries" regarding her discharge, informing her that NaphCare "found" the missing narcotics and asking if she was going to get her job back. She also alleges that she was "turned down for an educational opportunity" because the issue of the missing narcotics at NaphCare remained unresolved. *Id.* at 19.

II. PROCEDURAL HISTORY

On October 4, 2012, O'Malley filed a Motion for Leave to Proceed in forma pauperis and an attached Complaint *pro se*, alleging a defamation claim against NaphCare. Doc. #1; Doc. #3. On December 28, 2012, Defendant filed a Motion

to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Doc. #7. Plaintiff filed a Response (Doc. #10) on January 22, 2013, and Defendant filed a Reply (Doc. #12) on February 4, 2013. Two days later, on February 6, 2013, Plaintiff filed a Motion for Leave to File a First Amended Complaint. Doc. #13.

On March 27, 2013, Attorney Adam Grant Anderson filed a Notice of Appearance on behalf of the Plaintiff. Doc. #19. Magistrate Judge Michael J. Newman filed a Report and Recommendations (Doc. #21) on April 9, 2013. He sustained Plaintiff's Motion to Amend (Doc. #13) and recommended that the Court deny as moot, and without prejudice to renewal, Defendant's pending Motion to Dismiss (Doc. #7), as it was directed at Plaintiff's original complaint. Judge Newman also directed Plaintiff, with the assistance of her newly retained counsel, to file a Second Amended Complaint. Doc. #21 at 2.

Plaintiff complied, and subsequently filed a Motion for Leave to Amend on April 17, 2013, with the Second Amended Complaint attached as an exhibit. Doc. #23. The Second Amended Complaint states the following claims: Count One, wrongful termination under the state whistleblower protection statute, Ohio Revised Code § 4113.52; Count Two, a state common law claim for defamation; Count Three, a state common law claim for intentional infliction of emotional distress; Count Four, discrimination in violation of the ADEA, 29 U.S.C. § 623; Count Five, a state common law claim for wrongful discharge in violation of public policy; and Count Six, violation of her First Amendment right to free speech under 42 U.S.C. § 1983.

On May 6, 2013, NaphCare filed a Partial Motion to Dismiss Plaintiff's Second Amended Complaint, directed at all but O'Malley's ADEA age discrimination claim. Doc. #24. NaphCare filed the motion assuming that the Court would grant O'Malley's Motion for Leave to Amend, and that the Second Amended Complaint attached as an exhibit to that motion was the "operative complaint in this matter." Doc. #24 at 4.

O'Malley filed a Response in Opposition to Naphcare's Partial Motion to Dismiss on May 27, 2013 (Doc. #25), and NaphCare filed a Reply on June 13, 2013 (Doc. #26).

On July 8, 2013, the Court filed a Decision and Entry (Doc. #28) that adopted the Magistrate Judge's Report and Recommendations (Doc. #21), overruled without prejudice NaphCare's original Motion to Dismiss (Doc. #7), and granted Plaintiff's Motion to Amend her First Amended Complaint (Doc. #23). O'Malley's Second Amended Complaint was subsequently placed on the docket on July 26, 2013. Doc. #29.

On December 9, 2013, Defendant McIntyre and Defendant Carlisle filed a Motion to Dismiss Plaintiff's Second Amended Complaint. Doc. #33. Therein, they move the Court to dismiss all of the claims against them under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Doc. #33. O'Malley filed a Response in Opposition (Doc. #38) on December 30, 2013, and Defendants McIntyre and Carlisle filed a Reply Brief (Doc. #39) on January 16, 2014.

III. STANDARD OF REVIEW

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must present "a short and plain statement of the claim showing that the pleader is entitled to relief" to satisfy the pleading standard of the federal courts. "Specific facts are not necessary," as the statement need only provide the defendant fair notice of the nature of the claim and upon what grounds it rests. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Nevertheless, Rule 8(a)(2) "imposes both legal *and* factual demands on the authors of complaints." *16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 503, (6th Cir. 2013) (citing *Twombly*, 550 U.S. 544 and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). Thus, a plaintiff must "plead enough 'factual matter' to raise a 'plausible' inference of wrongdoing. The plausibility of an inference depends on a host of considerations, including common sense and the strength of competing explanations for the defendant's conduct." *Id.* (citing *Twombly*, 550 U.S. at 567 and *Iqbal*, 556 U.S. at 682, 678).

A complaint that fails to meet the pleading requirement of Rule 8(a)(2) is vulnerable to dismissal for "failure to state a claim upon which relief can be granted" under Rule 12(b)(6). The party moving for dismissal under Rule 12(b)(6) bears the burden of showing that the non-moving party's pleading has failed to adequately state a claim for relief. *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007) (citing *Carver v. Bunch*, 946 F.2d 451, 454-55 (6th Cir. 1991)). The Rule 12(b)(6) analysis requires a court to "construe the complaint in the light most

favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Handy-Clay v. City of Memphis, Tenn.*, 695 F.3d 531, 538 (6th Cir. 2012) (quoting *Treesh*, 487 F. 3d at 476); *see also Erickson v. Pardus*, 551 U.S. 89, 94 (2007). However, "[t]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678.

In accordance with the requirements of Rule 8(a)(2), the plaintiff's complaint must contain "enough facts to state a claim to relief that is plausible on its face" to survive a motion to dismiss under Rule 12(b)(6). *Twombly*, 550 U.S. at 570. "Although this standard does not require 'detailed factual allegations,' it does require more than 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555). Unless the facts as alleged show that the plaintiff's claim crosses "the line from conceivable to plausible, [the] complaint must be dismissed." *Twombly*, 550 U.S. at 570.

IV. ANALYSIS

Defendants' motions argue for dismissal of all claims in O'Malley's Second Amended Complaint, with the exception of her ADEA claim against Defendant NaphCare. The Court will examine each claim in the order presented in the Second Amended Complaint.

A. Count One - Retaliatory Discharge under Ohio Rev. Code § 4113.52, the Ohio Whistleblowers' Protection Act

Count One of O'Malley's Second Amended Complaint states that it arises under the OWPA, Ohio Rev. Code § 4113.52. Doc. #29 at 19-20. The OWPA requires an employee who reasonably believes that an employer's violation of a federal or state law or regulation "that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety, [or] a felony" to report the violation to the employer. Ohio Rev. Code § 4113.52(A)(1)(a). If the employer does not correct the violation, the employee may report the violation to a governmental body with prosecutorial authority over the employer. *Id.* An employer who retaliates against the reporting employee may be civilly liable, but the employee must file suit "within one hundred eighty days after the date the disciplinary or retaliatory action was taken" against the employee. *Id.* § 4113.52(D). An employee who seeks protection as a whistleblower "must strictly comply with the dictates of [the OWPA]. Failure to do so prevents the employee from claiming the protections embodied in the statute." *Contreras v. Ferro Corp.*, 652 N.E.2d 940 (Ohio 1995).

NaphCare argues that O'Malley's OWPA claim is barred by the statute of limitations because she filed suit approximately one year after her termination, far outside the allowable 180 day period specified in the statute. Doc. #24 at 6. NaphCare also argues that, even if the claim were not time barred, it fails as a

matter of law because O'Malley fails to allege any criminal conduct, a required element of an OWPA claim. *Id.*

Like Defendant NaphCare, Defendants McIntyre and Carlisle argue that O'Malley's claim is time barred. Doc. #33 at 5-6. They also argue that O'Malley's claim against them must fail because Ohio law does not allow for supervisor liability under the OWPA. *Id.* at 4-5.

O'Malley does not address any of Defendants' arguments for dismissal of her OWPA claim. Doc. #25; Doc. #38. Defendants note this fact in their Reply Briefs and argue that, as a result, O'Malley has effectively conceded to their arguments. Doc. #26 at 1; Doc. #39 at 1.

It may be generally true that "[f]ailing to respond to arguments properly raised in a motion to dismiss constitutes abandonment of that position," and the dismissal of the claim is ultimately warranted. *Washington v. Roosen, Varchetti & Oliver, PPLC*, 894 F. Supp. 2d 1015, 1027 (W.D. Mich. 2012) (citing *Alioto v. Town of Lisbon*, 651 F.3d 715, 721 (7th Cir.2011) and concluding that defendant was "entitled to dismissal" of claims after plaintiff failed to respond to defendant's arguments for dismissal). Nevertheless, the Court must still ensure that the movant has discharged the burden it bears in moving for dismissal under Federal Civil Rule 12(b)(6), which is not alleviated simply by pointing to the plaintiff's failure to respond. *Carver v. Bunch*, 946 F.2d 451, 454-55 (6th Cir. 1991). *Carver* dealt with the complaint in its entirety, but the proposition holds true for an individual claim. In moving for dismissal, Defendants must still show that O'Malley

has failed to state a claim under the OWPA. *Directv. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007) (citing *Carver*, 496 F.2d at 454-55).

Here, Defendants have met their burden for dismissal of O'Malley's OWPA claim. Accepting as true the facts as she has pled them, her claim is barred by the OWPA's statute of limitations. In Count One of the Second Amended Complaint, she alleges that she "was chastised, harassed and subsequently discharged" as a result of her report of the bed bug incident to the health department. Doc. #29 at 20. O'Malley alleges that NaphCare discharged her on October 5, 2011. *Id.* The statute is clear that the employee must file suit within 180 days after the date of the retaliatory action, and the Ohio Supreme Court requires strict compliance with the statute's requirements. Ohio Rev. Code § 4113.52(D); *Contreras*, 652 N.E.2d at 940. However, O'Malley filed suit on October 4, 2012, a year after the allegedly retaliatory discharge, and, therefore, six months after the latest possible date that the limitations period allowed her to file suit. Doc. #1.

After twice being given leave to amend her complaint, O'Malley has only alleged retaliatory actions that occurred well outside the limitations period to support her OWPA claim. Furthermore, by not responding to Defendants' arguments, she has forfeited any defense to them, such as an equitable tolling of the limitations period. Because Defendants have shown that her OWPA claim is time-barred under the facts O'Malley alleges, they have met their burden for its dismissal under Federal Civil Rule 12(b)(6). The Court will not, therefore, address NaphCare's alternate argument for dismissal based on the sufficiency of the claim,

or the assertion that Defendants McIntyre and Carlisle, as supervisors, cannot be held liable under the OWPA. Accordingly, O'Malley's claim for relief arising under the OWPA, Count One of her Second Amended Complaint, is dismissed with prejudice against all Defendants.

B. Count Two – Defamation

Count Two of O'Malley's Second Amended Complaint alleges a common law claim for defamation. Under Ohio law, "defamation occurs when a publication contains a false statement 'made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession.'" *Jackson v. Columbus*, 883 N.E.2d 1060, 1064 (Ohio 2008) (quoting *A & B-Abell Elevator Co. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 651 N.E.2d 1283 (Ohio 1995)). The manner of "publication" distinguishes slander, which refers to spoken defamatory statements, from libel, which refers to written or printed defamatory statements. *Lawson v. AK Steel Corp.*, 699 N.E.2d 951, 954 (Ohio Ct. App. 1997). When broken into elements, a defamation claim based on either libel or slander requires a plaintiff to show "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Harris v. Bornhorst*, 513

F.3d 502, 522 (6th Cir. 2008) (quoting *Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Serv., Inc.*, 611 N.E.2d 955, 962 (Ohio Ct. App. 1992)). By statute, Ohio places a one-year state of limitations on any defamation claim, requiring the plaintiff to file suit "within one year after the cause of action accrued." Ohio Rev. Code § 2305.11(A). For a libel claim, the cause of action begins to accrue upon the first publication of the defamatory statement. *T.S. v. Plain Dealer*, 954 N.E.2d 213, 214 (Ohio Ct. App. 2011). For a slander claim, the action accrues "at the time the words are spoken." *Foster v. Wells Fargo Fin. Ohio, Inc.*, 960 N.E.2d 1022, 1026 (Ohio Ct. App. 2011).

NaphCare presents several arguments for dismissal of O'Malley's defamation claim. Doc. #24 at 7-10. First, NaphCare argues that a claim based on any statements made before October 4, 2011, is time-barred by the statute of limitations. *Id.* at 7. Second, NaphCare asserts that O'Malley has failed to identify a defamatory statement that might form the basis for a slander claim. *Id.* at 7-9. Third, NaphCare argues that O'Malley has failed to identify any false or defamatory statement in the discharge summary that might form the basis for a defamation claim based on libel, or to whom such statements were made. *Id.* at 9-10. Finally, NaphCare believes that O'Malley's admission that she herself volunteered the same information a third party, Captain Roy, defeats her defamation claim. *Id.* at 10.

Defendants McIntyre and Carlisle make similar arguments for dismissal of O'Malley's defamation claims against them. They point out that O'Malley fails to identify a single defamatory statement made by McIntyre, his name is never

mentioned in Count Two, and the only comments allegedly made by McIntyre occurred in August 2011, well outside the statute of limitations. Doc. #33 at 6. O'Malley did not allege a defamation claim against Defendant Carlisle until she filed the Second Amended Complaint on July 26, 2013, and all statements attributed to Carlisle occurred well before July 26, 2012. *Id.* at 6-7. Thus, Defendants argue that the statute of limitations bars any claim against Carlisle. *Id.* at 7. They also state that O'Malley does not allege that any statement made by Carlisle was defamatory or false, or that he drafted the allegedly false discharge summary. *Id.* O'Malley also fails to identify to whom any false statement was made, Defendants argue, nor does she allege or identify any harm resulting from the alleged defamation. *Id.* at 7-8.

In response, O'Malley asserts that when the facts are construed in her favor, she clearly alleges that the false statement in question was NaphCare's assertion that she was responsible for the missing narcotics. Doc. #25 at 3; Doc. #38 at 3. She also argues that she timely asserted her defamation claim because she received phone calls from third parties after her October 5, 2011, termination, and she makes several new factual allegations to support an inference of post-termination dissemination of false information about her. Doc. #25 at 4; Doc. #38 at 4. O'Malley also states that Defendants cannot claim that their statement was privileged because they knew it was false. Doc. #25 at 4; Doc. #38 at 5. She alleges several acts that she characterizes as part of Defendants' "scheme" against her: the purposeful concealment of narcotics and records; contradictory statements

by Blair about exactly which drugs were missing after her termination; and the dissemination of the "false discharge summary" after October 4, 2011. Doc. #25 at 4. O'Malley argues that her statement to Captain Roy was merely an attempt to clear her own name, because she believed that he would be overseeing any investigation into missing narcotics, and that it should not be held against her as a voluntary publication of Defendants' defamatory statement. *Id.* at 4-5. Finally, she requests leave to file another amended complaint in order to plead factual allegations that address Naphcare's arguments. *Id.*

The Court finds it necessary to grant O'Malley's request to amend her defamation claim because it is impossible to test its legal sufficiency in its current form. First, she alleges that "Carlisle spoke with several nurses about Plaintiff's discharge on" October 3, October 4, and October 7, 2011. Doc. #29 at 21. She then alleges that:

> Defendant Carlisle and Defendant Blair spoke in general audience [sic] and in a one on one conversation with two nurses. Defendant Carlisle stating [sic] "if it had been any other nurse, they will [sic] still have their job, because it was Teresa, we had to do it, she made to [sic] many waves[."] Making references [sic] to "missing narcotics" in these same arenas.

Id. at 21.

As noted, O'Malley alleges that Carlisle made a statement about her discharge on October 7, 2011. If that statement was defamatory, it would fall within the one-year limitations period allowed by Ohio Rev. Code § 2305.11(A). However, the statement attributed to Carlisle above ("if it had been any other

nurse...") evidences no false statement, only animus towards O'Malley. The false statement that forms the basis for her defamation claim is a false accusation that she stole narcotics; thus, the "references" to "missing narcotics" *may* be an attempt to articulate that Carlisle falsely stated that she had stolen narcotics. The confused presentation only makes the foregoing interpretation a possibility, however, and it is only one that the Court can make by speculating about what O'Malley is trying to express. Other possibly relevant statements are even less intelligible: "Defendant presented Plaintiff with the falsity on October 5, 201 [sic]" or "Defendant dated for September 30, 2011," for example. Doc. #29 at 31. The Court cannot engage in speculation to test the sufficiency of the claim.

Plaintiff also alleges that an attached "discharge summary" supports her libel claim, but no such document was attached to the Second Amended Complaint. Doc. #25 at 4. In her Response, she states that it was "inadvertently not attached," refers the Court to an attached document, and asserts that it "was disseminated after October 4." *Id.* However, the attached document is unauthenticated, and the allegation regarding the date of its dissemination is absent from her actual claim. The allegation is important because without it, Plaintiff's libel claim is vulnerable to dismissal based on the statute of limitations. However, the allegation first appears in her Response, as do a number of other factual allegations that describe the dissemination of the false statements. *Id.* at 4; Doc. #38 at 4. To the foregoing, NaphCare properly objects. Doc. #26 at 2.

The Court simply cannot test the sufficiency of O'Malley's defamation claim as it is presented in the Second Amended Complaint, which was filed *after* she retained counsel. The claim is unchanged in form from the First Amended Complaint, when O'Malley was still proceeding *pro se*, in spite of the fact that Magistrate Judge Newman granted her leave to file the Second Amended Complaint because she had just retained counsel. *See* Doc. #21 at 2. Even though she has been previously granted leave to amend, the Court nevertheless believes that justice requires allowing Plaintiff to file a Third Amended Complaint to remedy the pleading deficiencies described above. Fed. R. Civ. P. 15(a)(2). Accordingly, the Court dismisses Plaintiff's defamation claim (Count Two) without prejudice. Plaintiff may file a Third Amended Complaint, within twenty (20) days from date, restating her defamation claim, bearing in mind the strictures of Rule 11 of Federal Rules of Civil Procedure.

C. Count Three – Intentional Infliction of Emotional Distress[4]

Under Ohio law, the tort of intentional infliction of emotional distress ("IIED") imposes liability on "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another . . . for such emotional distress, and[,] if bodily harm to the other results from it, for such bodily harm." *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of*

[4] Count Three of Plaintiff's Second Amended Complaint bears the caption "Emotional Infliction of Emotional Distress." Doc. #29 at 24. Because the language therein describes the tort of intentional infliction of emotional distress, the Court construes it as such.

Am., 453 N.E.2d 666, 671 (Ohio 1983) (quoting Restatement (Second) of Torts § 46 (1965)), *abrogated on other grounds by Welling v. Weinfeld*, 866 N.E.2d 1051 (Ohio 2007). A defendant is only liable for IIED when "the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.*

Defendants argue that they cannot be liable for any actions that took place before October 4, 2011, because of the statute of limitations. Doc. #24 at 10; Doc. #33 at 11. Even if Plaintiff's claim was timely, Defendants argue that as a matter of law, wrongful termination, being yelled at in a meeting, being escorted out of the building after being fired, and publishing a defamatory statement about her do not amount to the type of conduct that is actionable as an IIED claim. Doc. #24 at 11-13; Doc. #33 at 10-12.

O'Malley responds by asserting that Defendants' defamatory conduct inflicted emotional distress, and expressly incorporates arguments in support of her defamation claim into her IIED claim. Doc. #25 at 5; Doc. #38 at 6. She argues that Defendants' "false scheme" to defame her in order to justify firing her amounted to more than simple employee termination, and she therefore adequately states an IIED claim. Doc. #25 at 5.

Because Plaintiff argues that the facts that support her defamation claim are crucial to her IIED claim, and the Court has granted her leave to file an amended complaint that more clearly explains the basis for her defamation claim, it declines

to address the substance of her IIED claim at this time. Instead, the Court will dismiss Plaintiff's IIED claim (Count Three) without prejudice. Plaintiff may restate her IIED claim when she files a Third Amended Complaint, within twenty (20) days from date, along with a restated defamation claim, bearing in mind the strictures of Rule 11 of the Federal Rules of Civil Procedure.

D. Count Four – Age Discrimination under the ADEA

Defendant NaphCare does not seek dismissal of O'Malley's claim against it under the ADEA, which prohibits an employer from discharging "any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). Defendants McIntyre and Carlisle do, however, move the Court to dismiss O'Malley's federal age discrimination claim, to the extent she states it against them, arguing that there is no individual liability under the ADEA for supervisors. Doc. #33 at 13.

Although O'Malley does not respond to Defendants' argument, the Court agrees with Defendants. The ADEA provides a statutory definition of "employer" that does not include supervisors or managers. 29 U.S.C. § 630(b). Furthermore, it is specifically an "employer" that the ADEA holds liable for age discrimination. *Id.* § 623(a)(1); *see also Pennsylvania State Police v. Suders*, 542 U.S. 129, 138 n.4 (2004) (recognizing district court's dismissal of the plaintiff's "Title VII and ADEA claims against the individual defendants on the ground that those statutes do not provide for individual liability"); *Hiler v. Brown*, 177 F.3d 542, 546 n.5 (6th Cir. 1999) (noting that "[t]he ADA, ADEA, and the Rehabilitation Act borrowed the

definition of 'employer' from Title VII" and holding that "individuals who are not employers under Title VII cannot be held personally liable for retaliation under the Rehabilitation Act" while citing opinions of other Circuit Courts prohibiting the imposition of liability on non-employer individuals under the ADEA). Thus, O'Malley cannot state a claim under the ADEA against either Defendant McIntyre or Defendant Carlisle, who are individuals, and her purported ADEA claim against them is not cognizable as a matter of law. The Court, therefore, dismisses with prejudice any ADEA claim that O'Malley seeks to bring against Defendants McIntyre or Carlisle in Count Four of the Second Amended Complaint.

E. Count Five – Wrongful Discharge in Violation of Public Policy

Count Five of O'Malley's Second Amended Complaint alleges that NaphCare terminated her employment "for speaking out against abuse and safety violations relating to inmates," in contravention of the public policy of the State of Ohio. Doc. #29 at 27-28. According to all Defendants, O'Malley cannot state a claim under Ohio common law for wrongful discharge because her allegations fail to identify a "clear public policy" of Ohio law that such a claim requires. Doc. #24 at 13; Doc. #33 at 13-14. They argue that O'Malley's allegation that her termination violated public policy "relating to the care of inmates" is too vague and conclusory to support her claim. Doc. #24 at 13. Even if that statement adequately identified a violated public policy, however, Defendants further argue that O'Malley fails to allege facts that support the remaining elements of the claim. *Id.* at 14.

Defendants McIntyre and Carlisle also point out that O'Malley makes no allegations that McIntyre was involved in the decision to terminate her employment. Doc. #33 at 14.

Plaintiff responds by comparing her claim to that in *Dolan v. St. Mary's Memorial Home*, 794 N.E.2d 716 (Ohio Ct. App. 2003), in which an Ohio Court of Appeals recognized that a clear public policy exists that favors the reporting of patient abuse, but ultimately held that the plaintiff's common law claim was precluded because she had an existing remedy under Ohio Rev. Code § 3721.24, the statute prohibiting retaliatory discharge for reporting patient abuse. Doc. #25 at 6. Plaintiff argues that Standard 23–1.1 of the American Bar Association's Criminal Justice Standards on Treatment of Prisoners, which applies to private services providers such as NaphCare, qualifies as clear public policy that was jeopardized by her termination. *Id.* Plaintiff argues that there is no remedy for her other than the common law claim she asserts, which distinguishes her claim from *Dolan*. *Id.* at 7. Finally, she argues that the element of the claim requiring a lack of any overriding justification for her termination is demonstrated by her allegation that Defendants "concocted a false reason to fire" her. *Id.*

"The traditional rule in Ohio . . . is that a general or indefinite hiring is terminable at the will of either party, for any cause, no cause or even in gross or reckless disregard of any employee's rights, and a discharge without cause does not give rise to an action for damages." *Collins v. Rizkana*, 652 N.E.2d 653, 656 (Ohio 1995). However, if an employer discharges an employee in contravention of

"clear public policy," the tort of wrongful discharge in violation of public policy may provide a remedy to the terminated at-will employee. *Painter v. Graley*, 639 N.E.2d 51, 52 (Ohio 1994) (paragraph 2 of the syllabus). There are four elements to a common law claim for wrongful discharge in violation of public policy: 1) the existence of a clear public policy, as embodied in a constitution, statute, administrative regulation, or the common law; 2) the facts or circumstances surrounding the plaintiff's dismissal would jeopardize that policy; 3) conduct related to the policy motivated the plaintiff's dismissal; and 4) no overriding, legitimate business justification for the termination existed. *Wiles v. Medina Auto Parts*, 773 N.E.2d 526 (Ohio 2002) (citing *Painter*, 639 N.E.2d at 57 n. 8).

The plaintiff bears the "burden to articulate, by citation to its source, a specific public policy" that was violated by the termination of his or her employment. *Dohme v. Eurand Am., Inc.*, 956 N.E.2d 825, 830 (Ohio 2011). The policy in question "must be plainly manifested" in "the state or federal constitutions, a statute or administrative regulation, or the common law." *Id.* at 829. Whether or not a plaintiff's asserted policy qualifies as a "sufficiently clear public policy" is a matter of law. *Id.* (citing *Collins v. Rizkana*, 652 N.E.2d at 658).

Here, in Count Five of her Second Amended Complaint, O'Malley's common law wrongful discharge claim states only that her "termination contravenes clear public policies of Ohio, including regulations relating to the care of inmates." Doc. #29 at 28. In *Dohme*, the Ohio Supreme Court rejected language of similar vagueness, where the plaintiff alleged only that the defendant "jeopardized

workplace safety." 956 N.E.2d at 930. O'Malley's allegation is even less specific than in *Dohme*, where the plaintiff also cited an Ohio Supreme Court case holding that public policy favored workplace safety. *Id.* Nevertheless, even that policy statement was too nonspecific, and therefore "insufficient to meet the burden of articulating a clear public policy of workplace safety." *Id.* As in *Dohme*, O'Malley fails to articulate or cite a specific public policy violated by her termination.

O'Malley's Response cites to *Dolan v. St. Mary's Memorial Home*, 794 N.E.2d 716, 718 (Ohio Ct. App. 2003), in which the plaintiff alleged that the defendant nursing home terminated her employment after she reported a supervisor's verbal and emotional abuse of elderly residents to an outside organization. The *Dolan* plaintiff met her initial burden of identifying a clear public policy because the court acknowledged the "nursing home patients' bill of rights" embodied in Sections 3721.10–17 of the Ohio Revised Code. O'Malley argues that her "case is similar, except it deals with inmate-patients rather than elderly patients." Doc. #38 at 7. However, unlike the *Dolan* plaintiff, O'Malley cites no statutory authority to demonstrate the existence of a clear public policy on which she bases her claim, as required by *Dohme*. Unlike the *Dolan* plaintiff, she points to no specific public policy embodied in a constitution, statute, administrative regulation, or the common law as the basis for her claim.

Instead, O'Malley points to Standard 23-1.1 of the American Bar Association ("ABA") Criminal Justice Standards on Treatment of Prisoners. Courts have relied on the persuasive authority of the ABA's Criminal Justice Standards in countless

federal and state opinions. *E.g.*, *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (referencing ABA Criminal Justice Standards when describing norms of criminal defense representation and stating that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides"); *State v. Dunn*, 964 N.E.2d 1037 (Ohio 2012) (citing ABA Standards for Criminal Justice § 1-2.2 for the proposition that "police officers are duty-bound to provide emergency services to those who are in danger of physical harm" in analysis of community-caretaking/emergency-aid exception to warrant requirement of the Fourth Amendment). However, as influential as the ABA's Criminal Justice Standards have been to courts, they are only persuasive authority. The professional standards of a non-governmental organization, the ABA, do not qualify as the type of "clear public policy" the Ohio Supreme Court requires to satisfy the first element of O'Malley's common law claim for wrongful discharge. O'Malley must point to an Ohio court decision, a legislative enactment, or an administrative rule that adopts the ABA standard she cites. Otherwise, it has not been "plainly manifested" as a specific example of a clear public policy that her claim requires. *Dohme v. Eurand Am., Inc.*, 956 N.E.2d at 829.

O'Malley cannot state a common law claim for wrongful discharge against NaphCare, McIntyre, or Carlisle without identifying a "clear public policy," the first element of such a claim. The Court will not, therefore, address Defendants' arguments that she fails to state the other elements of the claim or that she makes

no allegations that McIntyre was involved in her dismissal. However, O'Malley's failure to identify a "clear public policy" does not mean that one does not, in fact, exist. The Court will, therefore, dismiss Count Five of her Second Amended Complaint without prejudice against all Defendants, but will grant O'Malley leave to amend her claim, within twenty (20) days from date. Any new claim presented to the Court must comply with the strictures of Rule 11 of the Federal Rules of Civil Procedure.

F. Count Six – First Amendment Retaliation Claim under 42 U.S.C. § 1983

O'Malley's final claim asserts that NaphCare, acting under color of state law, terminated her employment in retaliation for her "complaints of abuse and misconduct," thereby violating her constitutionally protected right of free speech. Doc. #29 at 29. In arguing for dismissal, NaphCare concedes that private companies such as itself may be held liable under 42 U.S.C. § 1983 in some circumstances, but argues that the statute does not impose liability for internal personnel decisions made with no input from the State of Ohio. Doc. #24 at 15. Defendants McIntyre and Carlisle also point out that O'Malley alleges no facts that suggest that they are state actors. Doc. #33 at 16.

In her Response, O'Malley argues that even though NaphCare is a private entity, it may be held liable under Section 1983 because it provides health care services to prisoners, and can, therefore, be liable for violations of the Eighth Amendment. Doc. #25 at 8. She also describes Defendants McIntyre and Carlisle

as "the individuals that masterminded the deprivation of [her] constitutional rights," and asserts that they may be held liable under Section 1983. Doc. #38 at 10.

NaphCare's Reply points out that O'Malley fails to even allege that the State of Ohio had any role in the termination of her employment, and accuses her of trying to distract from the issue by "citing to cases that relate to Section 1983 claims brought by *inmates* against private companies that operate prisons." Doc. #26 at 9. Without any alleged input from the state, Defendants argue that her claim must fail against all of them. Doc. #39 at 7-8.

As the parties' arguments suggest, the threshold question is whether any of the private party Defendants may be held liable under Section 1983 for firing O'Malley. The statute imposes liability on any "person who, under color of" state law, deprives a plaintiff of his or her constitutional rights. 42 U.S.C. § 1983. "A plaintiff may not proceed under § 1983 against a private party 'no matter how discriminatory or wrongful' the party's conduct," unless the private party acted under color of state law. *Tahfs v. Proctor*, 316 F.3d 584, 590 (6th Cir. 2003) (quoting *Am. Mfrs, Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999)). To impose liability on a private party under Section 1983, the private party's conduct must be "fairly attributable to the state." *Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629, 636 (6th Cir. 2005) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 947 (1982)). In other words, the "core issue" is whether O'Malley's termination "can be fairly seen as state action." *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982). There are "three tests for determining the existence of state action in a

particular case: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test." *Id.* (citations omitted).

"Under the public function test, a private party is deemed a state actor if he or she exercised powers traditionally reserved exclusively to the state." *Chapman v. Higbee Co.*, 319 F.3d 825, 833 (6th Cir. 2003). The test is "interpreted narrowly." *Id.* In *West v. Atkins*, the Supreme Court held that a physician performed a state function when he provided medical treatment to prisoners pursuant to a contract with the state, and could therefore be sued under Section 1983 for an Eighth Amendment violation resulting from the treatment. 487 U.S. 42 (1988). Similarly, NaphCare's provision of medical services to prisoners pursuant to a contract with the Montgomery County Jail may be considered an exercise of powers traditionally reserved exclusively to the state under the state function test, and NaphCare might, therefore, be liable for a constitutional violation arising from the medical treatment it provides. *See also Hicks v. Frey*, 992 F.2d 1450, 1458 (6th Cir. 1993) (citing *West* when stating that "[i]t is clear that a private entity which contracts with the state to perform a traditional state function such as providing medical services to prison inmates may be sued under § 1983 as one acting 'under color of state law'").

However, O'Malley is not a prisoner bringing an Eighth Amendment claim based on NaphCare's services as a medical provider in a correctional facility, the only sphere of action that may be fairly identified as within the public function that NaphCare performs for the state. Her alleged injury arises instead from the

termination of her employment. The distinction between the two categories of NaphCare's actions– the medical services it provides to prisoners and its internal personnel decisions– is crucial to the question of what can be "fairly seen as state action." *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982). The Supreme Court recognized this distinction in *Rendell-Baker*, rejecting the contention of a group of teachers formerly employed by a private, non-profit school that the school's termination of their employment could be considered state action under Section 1983. Like O'Malley, the teachers alleged that their termination amounted to retaliation for exercising their First Amendment rights. *Id.* at 834-35. Even though the private school received state funding and many of its actions were regulated by the state, there was no indication that the decisions to terminate the teachers were "compelled or even influenced by any state regulation." *Id.* at 841. The Court also noted that "in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters." *Id.*

Here, O'Malley merely alleges that "NaphCare is a quasi-governmental agency, which performs a governmental function and receives government funding" from the Montgomery County Jail.[5] Doc. #29 at 31. Even when

[5] It is unclear what O'Malley means by a "quasi-governmental agency." She does not, for example, allege that NaphCare is a corporation set up by the state. Elsewhere she alleges that NaphCare is a private corporation based in Alabama. Doc. #29 at 1-2. She may refer to NaphCare as a "quasi-governmental" entity because it receives state funds, but, as discussed above, the receipt of state funds alone is insufficient to impute the actions of a private corporation to the state. *Rendell-Baker*, 457 U.S. at 841. In the absence of any explanatory allegations, the

construed in her favor, under *Rendell-Baker*, these allegations are insufficient to allege that state action factored into NaphCare's decision to terminate O'Malley. The receipt of state funds alone does not subject every action of a contractor like NaphCare to constitutional scrutiny, as the "receipt of public funds does not make the discharge decision[] [an act] of the State." *Rendell-Baker*, 457 U.S. at 840-41 ("Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts").

Most importantly, there is no allegation that the State of Ohio or the Montgomery County Jail influenced, compelled, or provided any input into NaphCare's decision to fire O'Malley. *See Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992) (affirming grant of summary judgment to mental health facility funded and regulated by the state on fired worker's Section 1983 claim, as no state action was attributable to facility where personnel decisions were independent of state control); *Crowder v. Conlan*, 740 F.2d 447, 449-50 (6th Cir. 1984) (holding that decision by hospital to restrict physician's privileges was not "fairly attributable" to state where "the state was not directly involved in the challenged activities," even though the hospital had been purchased by the county but leased back to its trustees, was funded and regulated by state, and had state officials on its board of directors); *Bell v. Mgmt. Corp.*, 122 Fed. App'x 219 (6th Cir. 2005) (citing *Rendell-Baker*, *Wolotsky*, and *Crowder,* and holding that decision

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Court considers "quasi-governmental" a mere label that does not adequately allege state action. *See Twombly*, 550 U.S. 544, 555 (2007).

of private corrections facility operator to terminate plaintiff's employment was not state action where "Ohio had no input in, and no regulation applicable to [defendant's] internal personnel actions").

Furthermore, O'Malley's allegations do not satisfy either the "state compulsion" or "symbiotic relationship/nexus" tests for state action. "The state compulsion test requires that a state exercise such coercive power or provide such significant encouragement, either overt or covert, that in law the choice of the private actor is deemed to be that of the state." *Wolotsky*, 960 F.2d at 1335. O'Malley alleges no action of the state at all related to her termination, much less an act of coercion or encouragement. The symbiotic relationship/ nexus test requires "a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Id.* O'Malley alleges no nexus between the state and the decision to terminate her employment. The only connection she alleges with the state is the contractual relationship between NaphCare and the Montgomery County Jail, which, under *Rendell-Baker*, is insufficient to plausibly allege state action, and has no connection to the decision to terminate her employment. 457 U.S. at 841.

Because O'Malley does not allege any action related to her discharge that might be "fairly attributable" to the state, her Section 1983 claim against Defendants fails at that threshold inquiry. The Court, therefore, dismisses Count Six of her Second Amended Complaint against all Defendants, without prejudice, and grants O'Malley leave to amend her Section 1983 claim, within twenty (20)

days from date, with plausible factual allegations of state action. Any amended Section 1983 claim O'Malley files must comply with the strictures of Rule 11 of the Federal Rules of Civil Procedure.

V. CONCLUSION

For the reasons set forth above, the Court SUSTAINS Defendant Naphcare, Inc.'s Partial Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. #24), and SUSTAINS Defendants Jeff McIntyre and Karina Carlisle's Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. #33).

Count One of Plaintiff's Second Amended Complaint, alleging wrongful termination under Ohio's whistleblower protection statute, Ohio Revised Code § 4113.52, against all Defendants is DISMISSED WITH PREJUDICE.

Count Four of the Second Amended Complaint, Plaintiff's age discrimination claim under the ADEA, 29 U.S.C. § 623, is DISMISSED WITH PREJUDICE as to Defendants Jeff McIntyre and Karina Carlisle. Said claim is not dismissed against Defendant NaphCare, Inc.

All other claims against all Defendants are DISMISSED WITHOUT PREJUDICE. Plaintiff is granted leave to file a Third Amended Complaint, within twenty (20) calendar days from date, to replead the claims dismissed without

prejudice. Plaintiff is advised that all future amendments filed with the Court must take into account the strictures of Rule 11 of the Federal Rules of Civil Procedure.

Date: February 28, 2014

WALTER H. RICE
UNITED STATES DISTRICT JUDGE