[Cite as *Abdollahi v. Ohio Dept. of Public Safety*, 2016-Ohio-1252.]

ALI ABDOLLAHI nka MICHAEL ALI ARMAN Plaintiff v. OHIO DEPARTMENT OF PUBLIC SAFETY Defendant	Case No. 2014-00286 Judge Patrick M. McGrath Magistrate Holly True Shaver ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On November 30, 2015, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On December 17, 2015, plaintiff filed a response. On December 23, 2015, defendant filed a motion for leave to file a reply, which is GRANTED, instanter. The motion is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

{¶2} Civ.R. 56(C) states, in part, as follows: "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶3} On January 14, 2001, plaintiff began his employment with defendant as a Network Administrator Supervisor. Prior to his employment with defendant, plaintiff had worked for the Ohio Department of Health (ODH). On August 9, 2002, plaintiff signed a letter of resignation, addressed to Richard Nagel. (Defendant's Exhibit A, p. 61.) On April 11, 2003, plaintiff entered into a settlement agreement with defendant to resolve all possible disputes and claims arising from his employment. (Plaintiff's second amended complaint, Exhibit A.) In consideration for the agreement, defendant agreed to "immediately remove any indicator or designation from personnel files that have a reference regarding the re-employment of" plaintiff. (*Id*., ¶ 2.) The parties agreed that "each shall keep the terms and facts of this Agreement completely confidential and has not disclosed, and shall not hereafter disclose, any information concerning this Agreement to anyone except as required by law." (*Id*., ¶ 4.)

{¶4} In his second amended complaint, plaintiff alleges that "sometime after executing the agreement" he was interviewed for a position at ODH. On May 19, 2003, Jodi Govern, General Counsel for ODH, sent a request to defendant's office of human resources for a copy of "any investigation reports, disciplinary actions, and settlement agreements" pertaining to plaintiff pursuant to R.C. 149.43, Ohio's Public Records Act. (Plaintiff's second amended complaint, Exhibit B.) Plaintiff was not selected for the position at ODH.

{¶5} Plaintiff alleges that "sometime after" he was interviewed, he became aware that the security station at ODH had been given his photograph with instructions not to admit him into the building. Plaintiff testified in his deposition that he interviewed for the position at ODH and found out about his picture being at the security station at ODH in 2003. (Plaintiff's deposition, pp. 53-55.)

{¶6} Plaintiff asserts that he applied for at least 32 positions with the state of Ohio between 2008 and 2013, but that he was not selected. In 2013, plaintiff requested a copy of his personnel file from defendant. When it was produced, plaintiff became

aware of the May 19, 2003, public records request from ODH. Plaintiff filed his complaint in this court on March 20, 2014.

{¶7} Defendant maintains that plaintiff's claims are barred by the applicable statute of limitations. Defendant alternatively argues that plaintiff has failed to state a claim for either breach of contract or fraud.

{¶8} R.C. 2743.16(A) states, in part: "civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties."

{¶9} Plaintiff claims that defendant breached the settlement agreement in 2003 when it provided documents from his personnel file, including the settlement agreement, in response to ODH's public records request. Defendant asserts that plaintiff's cause of action accrued at the latest, on June 23, 2003, when its employees complied with the public records request. Defendant submitted the affidavits of Richard Nagel and Terri West. Nagel, whose job title in 2003 was Assistant Human Resources Administrator, avers that he received the letter from Govern in May 2003, and that he forwarded it to the appropriate Human Resources Unit for them to review it and respond to it. (Defendant's Exhibit B.) In her affidavit, West, who was an Executive Secretary 1 in 2003, avers that she received a public records request letter from Jodi Govern in May 2003, and that pursuant to that request, she mailed Govern copies of five investigation reports and a copy of the settlement agreement on June 23, 2003. (Defendant's Exhibit C).

{¶10} In Ohio, the general rule is that "a cause of action accrues and the statute of limitations begins to run at the time the wrongful act was committed." *Collins v. Sotka*, 81 Ohio St.3d 506, 507, 1998-Ohio-331 (1998). The discovery rule, however, is an exception to the general rule and provides that "a cause of action accrues when the plaintiff discovers, or in the exercise of reasonable care should have discovered, that he

or she was injured by the wrongful conduct of the defendant." *Id*. However, "[n]o Ohio court has applied the discovery rule to a claim for breach of contract." *Cristino v. Bur. of Workers' Comp*., 10th Dist. Franklin No. 12AP-60, 2012-Ohio-4420, ¶ 41.

{¶11} Construing the evidence most strongly in plaintiff's favor, the only reasonable conclusion is that any breach stemming from defendant's response to the public records request occurred at the latest, on June 23, 2003, and that the discovery rule does not apply to plaintiff's breach of contract claim. Therefore, plaintiff had until June 23, 2005, to file his complaint based upon defendant's response to ODH's public records request.

{¶12} Plaintiff also argues that defendant breached the terms of the settlement agreement by failing to immediately remove any indicator or designation from his personnel file that refers to his re-employment. Although plaintiff does not point specifically to any designation in his personnel file that refers to his re-employment, the only reasonable conclusion is that his cause of action accrued in 2003, when plaintiff learned both that he was not selected for a position at ODH and that ODH had placed his photograph at the security station.

{¶13} Plaintiff asserts that defendant's breach of the settlement agreement constitutes a "continuing violation," in that he applied for 32 state jobs from July 7, 2008 to November 4, 2013, but was not selected. However, the continuing violation doctrine has not been extended to breach of contract cases in Ohio. *See Marok v. Ohio State Univ.*, 10th Dist. Franklin No. 13AP-12, 2014-Ohio-1184, ¶ 25-26. Construing the evidence most strongly in plaintiff's favor, the only reasonable conclusion is that plaintiff's breach of contract claims are barred by the applicable two-year statute of limitations.

{¶14} With regard to plaintiff's claim of fraudulent inducement, the discovery rule does apply. R.C. 2305.09(D). "The 'discovery rule' generally provides that a cause of action accrues for purposes of the governing statute of limitations at the time when the

plaintiff discovers or, in the exercise of reasonable care, should have discovered the complained of injury." *Investors REIT One v. Jacobs*, 46 Ohio St.3d 176, 179 (1989). Plaintiff asserts that he "discovered" that defendant had responded to the letter from Govern in 2013, after he had submitted his own public records request. However, even construing the evidence most strongly in plaintiff's favor, the court cannot conclude that plaintiff exercised reasonable care by applying for 32 positions over a five-year period with no success and then waiting until 2013, ten years after he had entered into the settlement agreement, to request a copy of his personnel file. "Constructive notice of facts, rather than actual knowledge of their legal significance, is enough to start the statute of limitations running under the discovery rule. If a person has knowledge of such facts as would lead a fair and prudent man, using ordinary care and thoughtfulness, to make further inquiry, and he fails to do so, he is chargeable with knowledge which by ordinary diligence he would have acquired." *Cristino, supra*, at ¶ 41 (internal citations omitted). The only reasonable conclusion is that plaintiff should have "discovered" any fraud when he learned in 2003 that ODH did not select him for employment and had a photograph of him at its security station. Therefore, the only reasonable conclusion is that all of plaintiff's claims are time-barred.

{¶15} Even if plaintiff's claims were not time-barred, his claim of breach of contract based upon defendant's compliance with a valid public records request fails as a matter of law. "In construing the terms of a written contract, the primary objective is to give effect to the intent of the parties, which we presume rests in the language that they have chosen to employ." *In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104, ¶ 29. "Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander v. Buckeye Pipe Line Co*., 53 Ohio St.2d 241 (1978), paragraph two of the syllabus.

{¶16} Plaintiff asserts that defendant's response to ODH's public records request was a breach of paragraph four of the settlement agreement which states: "each shall keep the terms and facts of this Agreement completely confidential and has not disclosed, and shall not hereafter disclose, any information concerning this Agreement to anyone *except as required by law*." (Emphasis added.) However, the version of R.C. 149.43 in effect in 2003 stated: "(1) 'Public record' means *records kept by any public office*, including, but not limited to, *state*, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in Ohio kept by a nonprofit or for profit entity operating such alternative school pursuant to section 3313.533 [3313.53.3] of the Revised Code." (Emphasis added.) Plaintiff does not cite to any exception under R.C. 149.43 that would shield the disclosure of his employment records. Moreover, the plain language of the settlement agreement contemplates a legal requirement to disclose plaintiff's employment records. "A public entity cannot enter into enforceable promises of confidentiality regarding public records." *State ex rel. Findlay Publ. Co. v. Hancock County Bd. of Commr's*, 80 Ohio St.3d 134, 137 (1997) (internal citations omitted). The affidavits of Nagel and West demonstrate that they complied with a public records request from ODH. Therefore, the only reasonable inference is that defendant did not breach the settlement agreement when it responded to a valid public records request.

{¶17} The elements of fraud are: "(1) a representation or, where there is a duty to disclose, concealment of a fact; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance." *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475 (1998).

{¶18} Plaintiff asserts that defendant falsely represented to him that his personnel file and the settlement agreement would remain confidential, with knowledge that those documents would not remain confidential, and that as a result, plaintiff has been denied employment with the State of Ohio.

{¶19} As stated above, the plain language of paragraph four of the settlement agreement shows that any representation of the confidentiality of the terms and underlying facts of the settlement agreement contemplated the possibility of disclosure "pursuant to law" i.e., a public records request. Therefore, the only reasonable conclusion is that defendant did not make a false representation about disclosing any information concerning the settlement agreement.

{¶20} With regard to plaintiff's claim that defendant made a false representation that it would immediately remove any indicator or designation from his personnel files that have a negative reference regarding his re-employment, the only reasonable conclusion is that defendant did not make that representation falsely. Defendant filed that affidavit of Darko Milic, an employee in its Office of Human Resources, who avers that Defendant's Exhibit A-1 is a true and accurate copy of plaintiff's personnel file, excluding benefits information. (Defendant's Exhibit A.) Plaintiff's personnel file contains a letter dated April 8, 2003, from an assistant attorney general to defendant's legal counsel, requesting him to execute the settlement agreement and to "perform obligations under Paragraph 2" of the settlement agreement. (Defendant's Exhibit A-1, page 31.) In addition, plaintiff's personnel file contains a memo dated April 11, 2003, from John Demaree, HR administrator, to Lewis George, Chief Legal Counsel, requesting that George have his staff "make the necessary changes under section 2 of this Agreement." (*Id*., page 33.) Construing the evidence most strongly in plaintiff's favor, the only reasonable conclusion is that defendant did not make any false representation in the settlement agreement. Furthermore, plaintiff testified during his deposition that he worked for the Ohio Department of Job and Family Services, a state

agency, from 2003 to 2006 on a contract basis. Although plaintiff would have preferred a full-time position, the fact that he did secure employment with a state agency after the 2003 settlement agreement was executed defeats plaintiff's claim of damages from any fraud.

{¶21} Accordingly, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. All previously scheduled events are VACATED. 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.

PATRICK M. MCGRATH
Judge

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