

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

SCOTT R. JAMISON	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Appellant/Cross-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 15 CAE 01 007
VILLAGE OF GALENA, OHIO ET AL	:	
	:	
Appellees/Cross-Appellants	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeal from the Delaware County Court of Common Pleas, Case No. 2013-CV-H 01 0026

JUDGMENT: Affirmed in part; Reversed in part

DATE OF JUDGMENT ENTRY: July 13, 2015

APPEARANCES:

For Appellant/Cross-Appellee

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Gwin, P.J.

{¶1} Appellant Scott Jamison ("Jamison") appeals the January 7, 2015 judgment entry of the Delaware County Court of Common Pleas granting summary judgment to appellees Village of Galena ("Village") and Mayor Thomas Hopper ("Hopper") on Jamison's claims. Cross-appellants Village of Galena and Hopper appeal the January 7, 2015 judgment entry of the Delaware County Court of Common Pleas granting summary judgment to cross-appellee Scott Jamison on their counterclaims.

Facts & Procedural History

{¶2} In 2005, the Village and Jamison, dba Jamison Environmental Consultants, entered into a written contract whereby Jamison operated the Village's wastewater treatment plant. The contract was a month-to-month contract and required sixty (60) day advance notice by either party to terminate the agreement. In 2011, the Village passed a resolution appointing Jamison as the Village Administrator, Public Service Director, Zoning and Property Maintenance Official, and Flood Plain Administrator for the period of January 1, 2012 through December 31, 2012.

{¶3} In 2008 or 2009, the Village decided to purchase a local historic church building to be renovated as the Village's new administrative offices. Jamison spoke out against the expenditure of funds to renovate the building at council meetings and in discussions with Hopper. Jamison was particularly concerned about the presence of bat dung in the attic of the building. On May 17, 2012, Jamison circulated to Village officials a report he obtained from Lyle Laboratories at a cost of \$480, detailing the need to remove the massive amounts of bat dung in the attic of the church building. On May 21, 2012, while not at work, Jamison sent an e-mail to the Delaware County

Commissioners from his personal e-mail address voicing his opposition to an application for funds for the Village. Jamison stated the application was a ruse on the part of Hopper to get money from the County to improve the Village Hall, a building Hopper shouldn't have bought. Jamison further stated that the building is not worth renovating at taxpayer's expense.

{¶4} On May 21, 2012, Hopper went to the Village of Galena Council ("Council") and requested that Jamison be immediately removed as Village Administrator. Council voted to remove Jamison as Village Administrator. On May 22, 2012, Hopper sent Jamison a letter stating that Council voted to immediately remove him without cause from the Village Administrator position. On May 24, 2012, Hopper sent Jamison a letter suspending him from his remaining duties while the Village conducted an investigation into personnel policy violations, including: insubordination by failing to turn over his computer password, creating and fostering a hostile work environment for other employees, unnecessary expenditures of Village funds, removing public records without authority, intentionally interfering with the business interest of the Village, disloyalty to the Village, and failure to cooperate with superiors and fellow employees regarding specific instructions. The letter stated that Jamison had the right to appeal the disciplinary action to Council pursuant to Section 4.4.1 of the Village's Personnel Policies and Procedures Manual. However, Hopper later acknowledged in his deposition that Jamison was a department head, and department heads are specifically exempted from a Section 4.4.1 appeal.

{¶5} On June 11, 2012, Hopper issued a second letter to Jamison stating that he conducted an investigation initiated by Jamison's attempt to undermine the Village's

transition into a new, renovated Village Hall and his continued attempts to undermine Hopper's authority. Hopper concluded that Jamison created a hostile work environment, created secret personnel reports, moved and locked all personnel files, removed or hid his own personnel file, attempted to undermine Hopper's authority, refused to provide him with computer passwords, constantly criticized the decision of Hopper and Council, purposely spent funds on a dump truck that was unnecessary so that funds would not be available to utilize for the new Village Hall, made inaccurate statements that Village personnel were becoming sick due to the Village Hall, made misleading statements to the County Commissioners to prejudice a grant application, ordered testing on the Village Hall that was unnecessary without Hopper's authority, did not share a public employment risk reduction inspection, moved or hid permits, and moved or relocated computer backup discs. Hopper stated that he would recommend to Council that Jamison be terminated as a Village employee. Also on June 11, 2012, Hopper prepared a report of investigation of Jamison providing details on the allegations as listed above. Hopper again recommended that Jamison be terminated from the remainder of the positions he held, other than the Village Administrator, the position from which Jamison was previously terminated.

{¶6} At a Council meeting held on June 18, 2012, Council voted to terminate Jamison's employment with the Village. Hopper sent a letter to Jamison on June 20, 2012, confirming his termination and stating that Jamison had ten (10) days to file an appeal with Council.

{¶7} On June 11, 2013, Jamison filed a complaint against the Village and Hopper, individually and in his official capacity as mayor, for: breach of the 2011-2012

employment contract, breach of the 2005 month-to-month contract for the operation of the wastewater treatment plant, violation of his First Amendment right to speech, conspiracy to deprive him of equal protection rights in violation of 42 U.S.C. Section 1985(3), intimidation in violation of R.C. 2921.03(C), defamation, and violation of public policy of Ohio.

{¶8} The Village and Hopper filed an answer and counterclaims against Jamison, alleging that Jamison intentionally and in a retaliatory fashion, improperly took advantage of and abused his public office and entrusted authority, diverting public monies from legitimate efforts.

{¶9} Jamison filed a motion for summary judgment on the Village and Hopper's counterclaims. The Village and Hopper filed a motion for summary judgment on Jamison's claims. Multiple depositions were submitted with the motions for summary judgment, including those of: Martha Mazzie, the Village's Fiscal Officer, Rodolfo Rodriguez, former council member, Scott Jamison, Nancy Feole, council president in 2012, Thomas Hopper, Chris Underwood, council member, Jeanna Burrell, current Village Administrator, David Simmons, council member, and Paul Bolander, council member. In a January 7, 2015 judgment entry of the Delaware County Court of Common Pleas, the trial court granted the Village's and Hopper's motion for summary judgment against Jamison. The trial court also granted Jamison's motion for summary judgment on the counterclaims asserted by the Village and Hopper. Accordingly, the trial court dismissed Jamison's complaint and dismissed the Village's and Hopper's counterclaims.

{¶10} Jamison appeals the January 7, 2015 judgment entry and assigns the following as error:

{¶11} "I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON MR. JAMISON'S CLAIMS BASED UPON ANY ALLEGED FAILURE TO PURSUE AN ADMINISTRATIVE APPEAL.

{¶12} "II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON MR. JAMISON'S CLAIM FOR BREACH OF EMPLOYMENT CONTRACT.

{¶13} "III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON MR. JAMISON'S CLAIM FOR BREACH OF THE OPERATING CONTRACT FOR SERVICES AS ENVIRONMENTAL CONSULTANT RUNNING THE WASTEWATER TREATMENT PLANT.

{¶14} "IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON MR. JAMISON'S FIRST AMENDMENT CLAIM.

{¶15} "V. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON MR. JAMISON'S CONSPIRACY CLAIM AGAINST MAYOR HOPPER.

{¶16} "VI. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON MR. JAMISON'S CLAIM THAT MAYOR HOPPER IS LIABLE UNDER R.C. 2921.03 FOR HIS MATERIALLY FALSE WRITING ABOUT MR. JAMISON CIRCULATED TO THE VILLAGE COUNCIL MEMBERS AND READ AT THE JUNE 18, 2012 VILLAGE COUNCIL MEETING.

{¶17} "VII. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON MR. JAMISON'S DEFAMATION CLAIM.

{¶18} "VIII. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON MR. JAMISON'S CLAIM THAT HIS FIRING VIOLATES THE PUBLIC POLICY OF OHIO."

{¶19} The Village and Hopper also appeal the January 7, 2015 judgment entry and assign the following as error:

{¶20} "I. THE TRIAL COURT ERRED, AS A MATTER OF LAW, WHEN IT GRANTED SUMMARY JUDGMENT TO APPELLANT/CROSS-APPELLEE ON APPELLEE/CROSS-APPELLANT'S COUNTERCLAIM, DETERMINING THAT APPELLEE/CROSS-APPELLANT HAD FAILED TO PRESENT ANY EVIDENCE TO SUPPORT THEIR ASSERTION THAT THE FUNDS SPENT BY APPELLANT/CROSS-APPELLEE HAD ANY IMPACT ON FUNDS AVAILABLE TO APPELLEE/CROSS-APPELLANT FOR RENOVATION AND MAINTENANCE OF THE NEW VILLAGE HALL.

{¶21} "II. THE TRIAL COURT ERRED, AS A MATTER OF LAW, WHEN IT DETERMINED THE DEPOSITION TESTIMONY CLEARLY ESTABLISHES THAT THERE IS NO LEGAL BASIS TO SUPPORT THE COUNTERCLAIM."

Summary Judgment

{¶22} Civ.R. 56 states, in pertinent part:

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 of 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 mostly strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

{¶23} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts. *Hounshell v. Am. States Ins. Co.*, 67 Ohio St.2d 427, 424 N.E.2d 311 (1981). The court may not resolve any ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning-Ferris Inds. of Ohio, Inc.*, 15 Ohio St.3d 321, 474 N.E.2d 271 (1984). A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 733 N.E.2d 1186 (6th Dist. 1999).

{¶24} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court. *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987). This means we review the matter de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186, 738 N.E.2d 1243.

{¶25} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrates absence of a genuine issue of fact on a material element of the non-moving party's claim. *Drescher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996). Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist. *Id.* The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary materials showing a genuine dispute over material facts. *Henkle v. Henkle*, 75 Ohio App.3d 732, 600 N.E.2d 791 (12th Dist. 1991).

I. & II. & III.

Administrative Appeal Requirement

{¶26} Jamison argues that the trial court erred in granting summary judgment on his breach of contract claims based upon the failure to pursue an administrative appeal. The trial court found that R.C. 2506.01 governed Jamison's appeal and since he did not file a timely administrative appeal, he had not exhausted his administrative remedies.

{¶27} The Village and Hopper contend that Jamison was required to appeal his termination by Council to Council pursuant to the village's employee manual. Section 4.4.1 of the village manual outlines the procedures for appeal and addresses the affected employee's rights and responsibilities related to such procedures. Pursuant to the manual, employees, with the exception of department heads, feeling aggrieved by a change in status (i.e. dismissal or demotion) may, in writing, appeal the disciplinary action to Council and the appeal must be filed in writing with the fiscal officer and

Council within ten days. However, in his deposition, Hopper specifically admits that Jamison was a department head and that the section on appeals in the village manual specifically exempts department heads. Accordingly, we find that Jamison was not required to appeal his termination pursuant to the village manual, as he was specifically exempt from such a requirement.

{¶28} The Village and Hopper next argue that Jamison was required to appeal the decision pursuant to R.C. 2506.01. R.C. 2506.01 permits a party to appeal a final decision of a political subdivision "that is the result of a quasi-judicial proceeding in which notice, a hearing, and the opportunity for the introduction of evidence have been given." *State ex rel. Municipal Constr. Equipment Operators' Labor Council*, 141 Ohio St.3d 113, 2014-Ohio-4364, 22 N.E.2d 1040. Quasi-judicial authority is "the power to hear and determine controversies between the public and individuals that *require* a hearing resembling a judicial trial." *State ex rel. Scherach v. Lorain Co. Board of Elections*, 123 Ohio St.3d 245, 2009-Ohio-5349, 915 N.E.2d 647. Whether a proceeding is a quasi-judicial proceeding "from which a R.C. 2506.01 appeal may be taken depends upon what the law requires the agency to do, not what the agency actually does." *State ex rel. Municipal Constr. Equipment Operators' Labor Council*, 141 Ohio St.3d 113, 2014-Ohio-4364, 22 N.E.2d 1040. The fact that a tribunal actually afforded these rights is not material to the inquiry, which focuses on whether the tribunal was required to afford such rights. *Id.*

Public Service Director, Zoning & Property Maintenance Official, and Flood Plain Administrator Positions

{¶29} In this case, we find that Jamison was not required to appeal the decision to terminate him from his non-statutory positions pursuant to R.C. 2506.01 because the termination of Jamison from these positions on June 18, 2012 at a Council meeting were not the result of a quasi-judicial proceeding. Jamison was not classified and was not a civil service protected employee. The Village and Hopper admit that the positions Jamison was terminated from on June 18, 2012 were non-statutory. Jamison maintained the duties of Public Services Director, Zoning and Property Maintenance Official, and Flood Plain Administrator pursuant to a one-year contract with a period of January 1, 2012 through December 31, 2012.

{¶30} With regards to these positions, there is no statutorily mandated quasi-judicial proceeding, only legislative action by Council rescinding Jamison's contract. No statute required Council to conduct a hearing resembling a judicial trial before it terminated Jamison from his non-statutory positions. The mere fact that Hopper gave Jamison limited notice and Council held a meeting at which Jamison and his legal counsel were invited and appeared does not mean that Council exercised the quasi-judicial authority required to make Jamison's termination appealable under R.C. 2506.01. The dispositive fact is that no statute required Council to give notice and hold a hearing. A party is not required to pursue administrative remedies when no administrative remedy exists. *State ex rel. Municipal Constr. Equipment Operators' Labor Council*, 141 Ohio St.3d 113, 2014-Ohio-4364, 22 N.E.2d 1040. Accordingly, Jamison had no right to pursue an administrative appeal pursuant to R.C. 2506.01. The

trial court incorrectly held that Jamison could not maintain a breach of contract claim with regard to the termination from his non-statutory positions on June 18, 2012 based upon his failure to pursue an administrative appeal.

Village Administrator Position

{¶31} Jamison argues the trial court erred in granting summary judgment to the Village and Hopper on Jamison's breach of contract claim for employment as Village Administrator. We disagree.

{¶32} R.C. 735.271 provides as follows:

The village administrator shall serve at the pleasure of the mayor and legislative authority of the village and may be removed without cause by the mayor with the consent of a majority of the members elected to the legislative authority of the village * * *.

{¶33} On May 21, 2012, at the request of Hopper, Council voted to immediately remove Jamison as Village Administrator, without cause. The minutes of the Council meeting of May 21, 2012 demonstrate that a majority (four out of six) Council members voted in favor of a motion to remove Jamison as Village Administrator and two Council members abstained. Hopper testified that he specifically asked Council to remove Jamison as Village Administrator. Accordingly, pursuant to the requirements contained in R.C. 735.271, Jamison was removed without cause by the mayor with the consent of a majority of the members elected to Council, the legislative authority of the Village.

Breach of Operating Contract for Services as Environmental Consultant

{¶34} Jamison contends the trial court erred in granting summary judgment to the Village and Hopper on his breach of contract claim with regards to the contract for

services for the wastewater treatment plant. The trial court granted the Village and Hopper's motion for summary judgment and found that since Jamison failed to file an administrative appeal pursuant to R.C. 2506.01, summary judgment was appropriate. As discussed above, no statute required Council to conduct a hearing resembling a judicial trial before it terminated the 2005 contract. Jamison had no right to pursue an administrative appeal pursuant to R.C. 2506.01 and the trial court incorrectly held that Jamison could not maintain a breach of contract claim with regard to the 2005 contract based upon his failure to pursue an administrative appeal.

{¶35} The Village and Hopper argue that summary judgment is appropriate because the 2005 contract was terminated when Jamison became Public Service Director. In 2005, Jamison and the Village entered into a contract by which Jamison was to maintain the wastewater treatment plant. This contract contains a provision requiring sixty (60) day advance notice by either party to terminate the agreement. Feole testified that she assumed someone gave Jamison notice about the 2005 contract being terminated, but she did not, and was not aware of anyone that did. Hopper testified that while he did not give Jamison sixty day notice in writing of the termination of the 2005 contract, Jamison understood that the 2005 contract was terminated beginning in January of 2012 because his duties at the wastewater treatment plant were included in the Public Service Director position. Jamison testified that he did not invoice the Village for wastewater plant operator duties after he was appointed Public Service Director because his pay for the wastewater plant management was included in his pay as Public Service Director. However, Jamison sent an invoice to the Village in June or

July of 2012 pursuant to the 2005 contract that he testified he has not received payment for.

{¶36} Based upon the conflicting testimony of Hopper, Feole, and Jamison as to whether the 2005 contract was terminated with his appointment as Public Service Director and whether Jamison had been fully paid for the work performed under the 2005 contract, we find that genuine issues of material facts exist and summary judgment on Jamison's breach of contract claim with regards to the 2005 contract is not appropriate.

{¶37} Accordingly, Jamison's first and second assignments of error are sustained as to the breach of contract claim for his termination from non-statutory positions (Public Service Director, Zoning and Property Maintenance Official, Flood Plain Administrator) and overruled as to the breach of contract claim for the statutory position of Village Administrator. Jamison's third assignment of error is sustained.

IV.

{¶38} Jamison filed suit under 42 U.S.C. § 1983, contending that his employment was wrongfully terminated because he had exercised his constitutionally-protected right of free speech. Jamison argues that the trial court erred in granting summary judgment on his First Amendment claim. In a § 1983 action, a plaintiff must demonstrate a deprivation of a right secured by the Constitution or laws of the U.S. caused by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988).

{¶39} The First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. *Garcetti v.*

Ceballos, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). An employee seeking to establish a case of retaliation for speech protected under the First Amendment must point to evidence sufficient to establish three elements: (1) the employee engaged in constitutionally protected speech; (2) the employee was subjected to adverse action or was deprived of some benefit; and (3) the protected speech was a substantial or motivating factor in the adverse action. *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). If the employee establishes this prima facie case of retaliation, the burden shifts to the employer to demonstrate by a preponderance of the evidence that the employment decision would have been the same absent the protected conduct. *Id.*

{¶40} For an employee to maintain a First Amendment claim against his employer, the employee must allege that he was seeking to exercise First Amendment rights with respect to a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Speech is a public concern generally when it includes speech that relates to any matter of political, social, or other concern to the community and when an employee is speaking as a private citizen rather than pursuant to his official duties. *Rodgers v. Banks*, 344 F.3d 587 (6th Cir. 2003). Determining whether speech involves a matter of public concern is based upon the "content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

{¶41} In this case, we find that the trial court erred in finding that Jamison's speech did not qualify as a "public concern" when he expressed his opposition to the expenditure of public funds to purchase and renovate the village hall. The Village's

expenditure of taxpayer funds is a matter of concern to the community. The Village's decision to spend money to renovate the village hall was a decision by the Village alone, as Feole testified that it was the decision of Council, not Jamison or Hopper, to spend the money to buy, sell, or renovate the village hall. Thus, any expenditure of funds to buy or renovate the village hall was not part of Jamison's official duties. Further, the letter sent by Jamison to the Delaware County Commissioners was sent from his private e-mail account and while he was not working. Hopper admitted in his testimony that the e-mail was sent from Jamison's personal account and that Jamison was not working the day he sent it.

{¶42} If the speech involves a matter of public concern, a court must balance interests of the "public employee, as a citizen, in commenting upon matters of public concern and the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). The burden is on the employer to prove legitimate grounds for the allegedly retaliatory action at issue. *Hughes v. Region VII Area Agency on Aging*, 542 F.3d 169 (6th Cir. 2008).

{¶43} While the Village and Hopper argue that Jamison took actions to undermine the Village and Hopper's efforts in renovating the building, Jamison presented evidence that, despite his opposition to the expenditure of the taxpayer funds for the project, Jamison performed the tasks assigned to him with regard to the renovation. Rodriguez, Feole, Bolander, Simmons, and Underwood testified that they had no problems with Jamison's work performance. Burrell testified that she could not think of anything Jamison refused to do relating to the village hall renovation and that

Jamison was the major person supervising the renovation work on the hall. While Hopper testified Jamison slowed things down on the project, Hopper could think of no specific examples of what Jamison failed to do that slowed the project down and also testified that the village hall was occupied on schedule. Further, though the Village and Hopper assert that Jamison refused to accept independent and scientific evidence on the issue in the village hall, Hopper testified that, other than the report commissioned by Jamison that indicated there was an issue with the bat dung in the attic, tests were not done prior to the village hall opening or prior to employees working in the hall. Burell testified that no air quality inspection was done in the village hall prior to occupancy in November of 2012, but that one was done after the village hall was occupied. Since Jamison was terminated in June of 2012, any report that contained evidence that the bat dung was not an issue was completed after Jamison was terminated.

{¶44} Finally, Jamison cites the testimony of Council members to indicate the Village did not have legitimate grounds for the allegedly retaliatory action. Rodriguez testified that when he voted to terminate Jamison from his positions on June 18, 2012, he did so solely because of the e-mail Jamison sent to the Delaware County Commissioners. Feole stated that she voted to terminate Jamison because of his expression of his view of the building and his disagreement with Council and Hopper about the expenditure of public funds for the building. Piper testified that the e-mail sent to the commissioners was one of the main reasons she voted to terminate Jamison.

{¶45} Based on the foregoing evidence, we find that the trial court erred in granting summary judgment on Jamison's First Amendment claim. There are genuine issues of material fact as to whether Jamison proved by the greater weight of the

evidence that his speech was a substantial and motivating factor in the employer's decision to discharge Jamison and whether the employer has shown, by the greater weight of the evidence, that Jamison would have been discharged even in the absence of his speech. Jamison's fourth assignment of error is sustained.

V.

{¶46} In Count 4 of Jamison's complaint, he alleges that "by conspiring to deprive him of equal treatment due to his protected speech, and in retaliation for exercising protected rights, defendants (and other officials of the Village of Galena) have violated 42 U.S.C. § 1985(3)." Jamison argues the trial court erred in granting summary judgment to the Village and Hopper on this claim.

{¶47} 42 U.S.C. § 1985(3) provides a civil remedy for persons injured by conspiracies to deprive them of their right to equal protection under the laws. *Taylor v. Brighton Corp.*, 616 F.2d 256 (6th Cir. 1980). A § 1985(3) claim stems from a conspiracy that: (1) interferes with a United States citizens' right or privilege; and (2) is motivated by a racial or other class-based, invidiously discriminatory animus. *Roe v. Franklin City*, 109 Ohio App.3d 772, 673 N.E.2d 172 (10th Dist. 1996).

{¶48} "An essential prerequisite for an action under § 1985(3) * * * is evidence that the defendant's conduct was motivated by racial or class-based discriminatory animus in violation of a plaintiff's right to equal protection under the law." *Hahn v. Star Bank*, 190 F.3d 708 (6th Cir. 1999). Thus, to sustain a claim under § 1985(3), a claimant must prove both membership in a protected class and discrimination on account of it. *Bartell v. Lohiser*, 215 F.3d 550 (6th Cir. 2000).

{¶49} In this case, there is no allegation or proof that the conduct at issue was motivated by a racial or otherwise class-based, invidiously discriminatory animus in violation of Jamison's rights to equal protection under the law. Accordingly, Jamison fails to state a claim under 42 U.S.C. § 1985(3) and the trial court did not err in granting summary judgment to the Village and Hopper on Count 4 of Jamison's complaint. Jamison's fifth assignment of error is overruled.

VI. & VII.

{¶50} Jamison contends the trial court erred in granting summary judgment on his defamation claim. Jamison asserts the June 11, 2012 letter, containing allegedly false statements, was provided to a reporter by Hopper and that the conduct was reported in a newspaper article in This Week News in Delaware County. Additionally, Jamison argues the trial court erred in granting summary judgment to the Village and Hopper on Jamison's claim that Hopper is liable under R.C. 2921.03 for the June 11, 2012 letter that Hopper circulated that allegedly contained materially false statements about Jamison designed to influence the Council members.

{¶51} R.C. 2921.03 provides:

(A) No person, knowingly and by force, by unlawful threat of harm to any person or property, or by filing, recording, or otherwise using a materially false or fraudulent writing with malicious purpose, in bad faith, or in a wanton or reckless manner, shall attempt to influence, intimidate, or hinder a public servant, party official, or witness in the discharge of the person's duty.

* * *

(C) A person who violates this section is liable in a civil action to any person harmed by the violation for injury, death, or loss to person or property incurred as a result of the commission of the offense and for reasonable attorney's fees, court costs, and other expenses incurred as a result of prosecuting the civil action commenced under this division. A civil action under this division is not the exclusive remedy of a person who incurs injury, death, or loss to person or property as a result of a violation of this section.

{¶52} To establish a claim for defamation, a plaintiff must show: (1) a false statement of fact was made about the plaintiff; (2) the statement was defamatory; (3) the statement was published; (4) the plaintiff suffered injury as a proximate result of the publication and (5) the defendant acted with the requisite degree of fault in publishing the statement. *Am. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832. A defamatory statement is the unprivileged publication of false and defamatory matter that tends to reflect injuriously on a person's reputation, or exposes a person to "public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business, or profession." *A&B-Abell Elevator v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 651 N.E.2d 1293 (1995).

{¶53} The article published in This Week News references the June 11, 2012 letter and specifically refers to the letter in terms of Jamison hiding personnel files, creating secret personnel reports on staff, purposefully spending funds unnecessarily, conducting an unnecessary drug test on an employee, and criticizing decisions by

Council and Hopper. With regards to the intimidation claim, some of the Council members specifically remember seeing the June 11, 2012 letter prior to the June 18, 2012 meeting in which they voted to terminate Jamison from his non-statutory positions.

{¶54} In this case, we find Jamison put forth evidence sufficient to create a genuine issue of material fact as to his defamation and intimidation claims. Hopper admitted that the problems with the employee that Jamison asked to be drug-tested were not unique to Jamison and Hopper testified that Jamison's request to drug-test the employee was not wrong, but the manner Jamison asked and the wait time was inappropriate. Though Hopper testified Jamison should not have been writing "secret reports" about employees, Hopper acknowledged that some supervisors find it helpful to take notes to recollect things down the road. As to the claim that Jamison failed to give Hopper computer passwords, Hopper agreed that Jamison's computer should have been protected from inappropriate access, admitted that he was never unable to access something he wanted to access on the Village's computer system while Jamison worked there due to the password protection, and, when he asked for the password on May 18th, Hopper had already decided to recommend that Jamison be terminated. Hopper testified that Jamison never refused to tell him where backup disks were and when the attorney asked for them, Jamison told him where they were.

{¶55} With regards to purposefully spending funds unnecessarily, Feole, Simmons, and Underwood testified that Jamison had the discretionary authority to spend up to \$5,000, that Council had the opportunity to review any bill before it was paid, Council signed off on the bills at issue, and none was aware of anyone making objections to Council about Jamison's expenditure of funds. Mazzie stated Jamison had

the discretionary authority to spend up to \$5,000 as Public Service Director and that whatever Jamison used in discretionary funds did not affect the Village's ability to do anything with regard to the village hall. Though Hopper testified that he thought spending thousands of dollars to replace a mower that is not used is a waste of money when trying to finish the village hall, Hopper agreed that Jamison had discretion to expend those funds, that Council had to authorize these checks to be written, and that he did not object to Council paying any of the bills at issue. Mazzie specifically testified that there was no situation during 2012 where the work on the village hall could not be done due to lack of funds and whatever Jamison used in discretionary funds did not affect the Village's ability to renovate the village hall.

{¶56} Accordingly, Jamison put forth sufficient evidence to create genuine issues of material fact as to the five elements of a defamation claim and to a R.C. 2921.03 intimidation claim.

{¶57} The Village and Hopper argue that the trial court did not err in granting summary judgment on the defamation and intimidation claims because any statements were subject to a qualified privilege and because there is no evidence of actual malice. The defense of qualified privilege is an affirmative defense. *Stepp v. Wiseco Piston Co., Inc.*, 11th Dist. Lake No. 2013-L-059, 2013-Ohio-5832. The privilege "applies in a variety of situations where society's interest in compensating a person for loss of reputation is outweighed by a competing interest that demands protection." *A&B-Abell Elevator Co.*, 73 Ohio St.3d 8, 651 N.E.2d 1283 (1995). The "essential elements" necessary to establish a common-law qualified privilege are "good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and

publication in a proper manner and to proper parties only." *Hahn v. Kotten*, 43 Ohio St.2d 237, 331 N.E.2d 713 (1975). The Village and Hopper contend that Hopper acted in good faith, there was an interest to uphold, the letter and report were limited in their scope and purpose, and the publication was made in a proper manner and only to a limited group of parties. The Village and Hopper specifically contend that Hopper had a duty pursuant to the Ohio Revised Code to make such a report to Council.

{¶58} Jamison argues that there is no reference to the Ohio Revised Code in the letter and no evidence that the letter was actually filed with Council, as required by the Ohio Revised Code. Further, Jamison contends that if Hopper had a duty to file the letter pursuant to the Ohio Revised Code, Jamison could only have been suspended by Council and only after Hopper filed charges with Council against him pursuant to R.C. 733.35. However, Hopper testified that he suspended Jamison on his own authority. Jamison further notes that he was terminated from his only statutory position on May 21, 2012, a fact which Hopper recognizes in his June 11, 2012 letter. Based on the foregoing, we find that Jamison sets forth evidence that there are genuine issues of material fact as to whether the essential elements of the affirmative defense of qualified privilege are established.

{¶59} Further, even if a jury determines that the Village and Hopper have sustained their burden of proof as to the affirmative defense of qualified privilege, we find that Jamison has met his burden to show that a genuine issue of material fact exists for the fact-finder to determine whether the qualified privilege is defeated by a clear and convincing showing that the communication was made with actual malice. See *Jacobs v. Frank*, 60 Ohio St.3d 111, 573 N.E.2d 609 (1991). Actual malice is defined as "acting

with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity." *Jacobs v. Frank*, 60 Ohio St.3d 111, 573 N.E.2d 609 (1991). In addition to the conflicting testimony of Hopper as detailed above with regards to the statements he made in the letter and report, Hopper testified that he did not discuss any of the issues with or contact Jamison during his investigation. Further, that he made no notes relating to his investigative report of Jamison.

{¶60} The Village and Hopper also contend that the defamation claim fails as a matter of law since the publication of the June 11, 2012 letter was accomplished in response to a valid public records request and because the letter was a public record. However, as noted in *Mehta v. Ohio University*, 194 Ohio App.3d 844, 2011-Ohio-3483, 958 N.E.2d 598 (10th Dist.), "there is no legal authority in Ohio providing blanket immunity from defamation for any and all content included within a public record." Here, Hopper testified that he knew when he wrote the report and the letter that they were public records, that they were subject to a public records request, and that anybody could request the information. Accordingly, Jamison's defamation claim does not fail, as a matter of law, simply because the letter was provided to the reporter via a public records request.

{¶61} Jamison's sixth and seventh assignments of error are sustained.

VIII.

{¶62} Jamison argues the trial court erred in granting summary judgment on his claim that his firing violates the public policy of Ohio. Public policy warrants an exception to the employment-at-will doctrine when an employee is discharged or disciplined for a reason which is prohibited by statute. *Greeley v. Miami Valley*

Maintenance Contractors, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990). A plaintiff may pursue a tort claim under the public policy exception only when the violated statute does not provide an adequate civil remedy. *Provens v. Stark Co. Board of Mental Retardation & Developmental Disabilities*, 64 Ohio St.3d 252, 594 N.E.2d 959 (1992).

{¶63} The elements of the tort of wrongful discharge in violation of public policy are: (1) a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element); (2) that dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element); (3) the plaintiff's dismissal was motivated by conduct related the public policy (the causation element); and (4) the employer lacked overriding legitimate business justification for dismissal (the overriding justification element). *Painter v. Graley*, 70 Ohio St.3d 377, 639 N.E.2d 51 (1994). Clarity and jeopardy elements are questions of law to be determined by the court, while causation and overriding justification elements are questions of fact. *Id.*

{¶64} Jamison alleges in his complaint that his discharge violates the letter and spirit of various Ohio and federal laws dealing with the protection of workers and the public workplaces and public places, including Sections 33 and Section 34, Article II, Ohio Constitution, R.C. 4101.11, R.C. 4101.12, R.C. 4101.13, R.C. 4121.17, R.C. 4121.48, Occupational Safety and Health Act of 1970, and Title 28 U.S. Code.

{¶65} In this case, we find Jamison has failed to meet his burden as to the "clarity" element. Though Jamison generally lists, in broad terms, the statutes and duties of employers and employees, there is no specific guidance or detailed statement

as to how each of these various acts, Constitutions, and Revised Code sections form a legal basis for a clear statewide public policy applicable to Jamison.

{¶66} The only specific policy Jamison cites as the basis for his violation of public policy claim is First Amendment retaliation and the assertion that he was fired for expressing his concerns about the bat dung present in the new village hall. Jamison's First Amendment retaliation claim and the potential civil remedy for such action is adequately addressed by our reversal of the summary judgment of his First Amendment retaliation claim in Assignment of Error IV.

{¶67} Jamison's seventh assignment of error is overruled.

Cross-Assignments of Error I. & II.

{¶68} The Village and Hopper argue that the trial court erred in granting summary judgment on their counterclaims that Jamison intentionally and in a retaliatory fashion improperly took advantage of and abused his public office and entrusted authority by diverting public monies from legitimate village business. The Village and Hopper specifically assert in their counterclaim that Jamison improperly spent approximately \$3,500 on repairs to a dump truck and lawn mowers, and refused to give Hopper passwords to the computer system.

{¶69} The Village and Hopper cite *State v. McKelvey*, 12 Ohio St.2d 92, 232 N.E.2d 391 (1967), for the broad proposition that "a public office is a public trust and a public official is a fiduciary" and encourage this Court to utilize the *McKelvey* case to reverse the decision of the trial court on their counterclaims. We decline to do so. First, in *McKelvey* and in cases citing and applying *McKelvey*, a public official used his or her position for private profit or gain, usually engaging in some sort of financial misconduct

or misappropriating funds in contravention of express statutory duties. *Id.*; *State ex rel. Cook v. Seneca County Board of Commissioners*, 175 Ohio App.3d 721, 2008-Ohio-736, 889 N.E.2d 153 (3rd Dist.); *Hope Academy Broadway Campus v. White Hat Mgmt., LLC*, 10th Dist. Franklin No. 12AP-496, 2013-Ohio-5036. This case is not analogous to *McKelvey*. In this case, the Village and Hopper have not alleged that Jamison misused his office for private gain or misappropriated funds in contravention of a statutory mandate. Rather, the Village and Hopper take issue with Jamison's decision-making process as to how to spend discretionary funds and how he utilized the computer system.

{¶70} Further, even if we were to apply the law advanced by the Village and Hopper in this case, the Village and Hopper have failed to meet their summary judgment burden to demonstrate that a genuine issue of material fact exists as to their counterclaims.

{¶71} Feole testified that Jamison had the discretionary authority to spend up to \$5,000, that Council had the opportunity to review any bill before it was paid and before the checks were issued and that Council signed off on the bills at issue. Further, that she was not aware of anyone making any objections to council about Jamison's expenditure of funds and that the mower repairs were not funds that Jamison expended improperly. Underwood testified that Jamison had the discretionary authority to spend up to \$5,000 and that before a check is issued, Council approves it. In addition, that in his years on Council, until the allegations in this lawsuit, no one said that Jamison was spending inappropriately. Burrell stated that any objections to the expenditures on the trucks and mowers were after Jamison left and no one was hired to determine whether

the money was needed for mower or truck repairs. Simmons testified that he was not aware of any instance where Jamison expended funds that he was not authorized to spend, that Jamison had authority to spend up to \$5,000, and the checks were approved by Council. Mazzie stated Jamison had the discretionary authority to spend up to \$5,000 as Public Service Director, that no one objected to expending the funds for the truck and the mower, and that whatever Jamison used in discretionary funds did not affect the Village's ability to do anything with regard to the village hall. Though Hopper testified that he thought spending thousands of dollars to replace a mower that is not used is a waste of money when trying to finish the village hall, Hopper agreed that Jamison had discretion to expend those funds, that Council had to authorize these checks to be written, and that he did not object to Council paying any of the bills at issue. Further, that he never talked to people who did the mower or truck repair to determine that the repairs were unnecessary.

{¶72} Accordingly, it is undisputed from the deposition testimony that Jamison had discretionary authority to expend up to \$5,000 on individual transactions without prior approval, that the expenditures at issue were less than \$5,000, that Council approves all payments and invoices prior to payments being made, and that there were no objections made to the mower and truck expenditures made by Jamison. The Village and Hopper failed to present any evidence that the repairs were unnecessary.

{¶73} In addition, Mazzie testified that the expenditure of the funds at issue came from the general maintenance budget item separate from any items budgeted for the village hall repair or renovation, that the separate maintenance budget was not exhausted for the fiscal year in question, and that \$14,295 of the separate maintenance

budget of \$40,000 for the new village hall remained when Jamison was terminated. Hopper testified that the village hall was occupied on schedule. Underwood testified that he was aware there was money left in the coffers to spend for the village hall. Burrell testified that they did everything they needed to do to occupy the village hall building and she believed there was funds leftover. Mazzie specifically testified that there was no situation during 2012 where the work on the village hall could not be done due to lack of funds and whatever Jamison used in discretionary funds did not affect the village hall. Thus, it is undisputed that the contested expenditures from the general maintenance budget items were separate from any items budgeted for the village hall and that there was no situation where work on the village hall could not be done due to lack of funds.

{¶74} With regards to the claim that Jamison failed to give Hopper computer passwords, Hopper agreed that Jamison's computer should have been protected from inappropriate access, admitted that he was never unable to access something he wanted to access on the Village's computer system while Jamison worked there due to the password protection, and, when he asked for the password on May 18th, Hopper had already decided to recommend that Jamison be terminated.

{¶75} The deposition testimony clearly establishes that, even if we were to consider the law as advanced by the Village and Hopper in *McKelvey*, there is no genuine issue of material fact as to the Village and Hopper's counterclaims. The Village's and Hopper's cross-assignments of error are overruled.

{¶76} Based upon the foregoing, Jamison's assignments of error V and VIII are overruled. Jamison's assignments of error III, IV, VI, and VII are sustained. Jamison's

assignments of error I and II are sustained as to the non-statutory positions and overruled as to the Village Administration position. The January 7, 2015 judgment entry of the Delaware County Court of Common Pleas is affirmed in part and reversed in part and we remand the matter to the trial court for further proceedings in accordance with the law and this opinion.

By Gwin, P.J.,

Hoffman, J., and

Baldwin, J., concur