[Cite as *Boyd v. Ohio Dept. of Mental Health*, 2011-Ohio-3596.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Michael Boyd,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-906 (C.C. No. 2007-03587)
Ohio Department of Mental Health,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on July 21, 2011

David A. Van Gaasbeek, for appellant.

Michael DeWine, Attorney General, and *Eric A. Walker*, for appellee.

APPEAL from the Ohio Court of Claims

KLATT, J.

{¶1} Plaintiff-appellant, Michael Boyd, appeals from a judgment of the Ohio Court of Claims in favor of defendant-appellee, the Ohio Department of Mental Health ("ODMH"), on Boyd's claims for racial discrimination in violation of R.C. 4112.02 and wrongful discharge in violation of public policy. For the following reasons, we affirm the judgment.

{¶2} In April 2001, ODMH hired Boyd as the Chief of Police for Heartland Behavioral Healthcare ("Heartland"), an ODMH-operated facility that provides inpatient care for mentally ill adults. As police chief, Boyd was responsible for directing Heartland's

security operations, supervising Heartland's police department, and maintaining a working relationship with Heartland department heads and administrative officials.

{¶3} Boyd's supervisor was Helen Stevens, then Heartland's chief executive officer. On September 6, 2002, Stevens conducted an annual review of Boyd's work performance. Stevens rated Boyd's overall performance as "satisfactory" and gave Boyd a "3," the highest rating, in each of the categories evaluated. The performance review included a "Goals and Objectives Attachment Form," in which Stevens set a time line for the development of an updated operations manual for the Heartland police department. According to the time line, Boyd was to complete the operations manual by July 1, 2003.

{¶4} Boyd took medical leave from July to September 2003 to undergo and recover from lower back surgery. In October 2003, Boyd returned to his job on a limited basis as part of a transitional work program. Boyd worked part time until January 2004, when he resumed his responsibilities full time.

{¶5} On November 27, 2003—while Boyd was working part time—Stevens conducted another annual review of Boyd's work performance. Again, Stevens rated Boyd's overall performance as "satisfactory" and gave Boyd a "3" in all the categories evaluated. However, the performance review also indicated that Boyd was "below target" in completing the operations manual. Stevens set a new deadline for completion—June 30, 2004.

{¶6} On March 10, 2004, B.B., a Heartland patient,[1] escaped from the custody of a Heartland therapeutic program worker. At the time of his escape, B.B. was visiting a local hospital for a stress test. Boyd joined in the initial search for B.B. When that search proved fruitless, Boyd returned to Heartland to interview the therapeutic program worker

[1] To preserve the patient's privacy, we use only his initials to identify him.

who had accompanied B.B. to the hospital. Shortly after Boyd completed that interview, Boyd spoke with Stevens and informed her that he had initiated an investigation into the escape. Later that day, the Stark County police found B.B. and returned him to Heartland.

{¶7} The Heartland police department's investigation into the escape focused, in part, on Deborah Deal, a clinical nurse manager, who had allowed B.B. to go to the hospital without a police escort. According to Boyd, Heartland policy required the nursing staff to secure a police escort for forensic patients, such as B.B., when those patients visited the hospital. Before B.B. had left for the hospital, Deal had contacted the Heartland police department seeking an escort, but no police officer was then available to escort B.B.

{¶8} Heartland's incident review committee considered the circumstances surrounding B.B.'s escape the day after it occurred. Heartland's incident review committee, which meets weekly, considers all reported incidents involving Heartland, its patients, and its staff. If the incident review committee determines that further action is needed regarding a particular incident, it refers the matter to the investigative review committee. The investigative review committee oversees investigations into incidents and decides whether to mete out discipline.

{¶9} In its March 11, 2004 meeting, the incident review committee decided that Heartland staff had acted appropriately in sending B.B. to the hospital without a police escort. While policy called for a police escort, Heartland's medical director determined that B.B.'s need for treatment for his heart condition superceded the policy when no Heartland police were available to provide the escort. The incident review committee

voted to close the investigation. Boyd was a member of the incident review committee, and he attended the March 11, 2004 meeting.

{¶10} Although the incident review committee did not refer the matter of the escaped patient to the investigative review committee, the investigative review committee discussed the matter at its March 11, 2004 meeting. The investigative review committee concurred with the incident review committee's determination that no further investigation into the matter was warranted.[2]

{¶11} Despite the determinations of the incident review committee and the investigative review committee, Boyd directed his department to continue its investigation.[3] Later, at trial, Boyd testified that he kept Stevens informed about the ongoing investigation. Stevens, however, flatly contradicted Boyd's contention. According to Stevens, she found out that the Heartland police department had prolonged its investigation into the escape when Boyd sent her the following e-mail on March 25, 2004:

> Just wanted to touch base with you regarding the AWOL incident involving Pt. [B.B.]. We are in the process of conducting an investigation regarding this incident. Are we to continue with this inquiry or should we leave this to the Nursing Dept. or Human Resources to investigate? To my knowledge, no information has been brought to the Investigative Review Committee re: this incident.

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[2] In his appellate brief, Boyd intimates that the actual reason the committees decided to close the investigation was to protect Deal, the clinical nurse manager who permitted B.B. to leave Heartland without a police escort. Deal is the wife of Ronald Deal, who was then Heartland's assistant chief executive officer. As part of his job duties, Ronald Deal served on the investigative review committee.

[3] On appeal, Boyd alleges that the Heartland police department continued its investigation because Boyd discovered *after* the March 11, 2004 committee meetings that Deal had sent B.B. to the hospital without a police escort. The record, however, lacks any evidence to support this allegation. Boyd, in fact, testified that he interviewed the therapeutic program worker who went with B.B. to the hospital on March 10, 2004—the day of the escape. Logically, Boyd would have learned during that interview that no Heartland police officer accompanied B.B. to the hospital. Moreover, when asked directly why he kept investigating after the incident review committee voted the investigation closed, the only answer Boyd gave was that he "was never informed that the incident review team had the authority to stop an investigation." (Tr. 125.)

> At this time, the infraction appears to be [a] violation of [Heartland] Policy re: escort of forensic clients.

Exhibit 18.

{¶12} The receipt of this e-mail disconcerted Stevens because earlier that day Boyd had assured Stevens that she was aware of all ongoing police department investigations. Stevens had sought that assurance from Boyd because she had just stumbled across another police investigation, involving potential workplace harassment, which she did not know was occurring.

{¶13} In response to the e-mail, Stevens demanded an immediate meeting with Boyd. In their March 26, 2004 meeting, Boyd agreed to make Stevens aware of any and all investigations as soon as practicable in the future. Despite this agreement, Stevens' dissatisfaction with Boyd's job performance did not abate. On March 28, 2004, Stevens told Boyd that she was considering revoking his unclassified appointment as Heartland's chief of police. Soon thereafter, Stevens presented Boyd with a memorandum stating the reasons why she was considering revoking his position. In part, the memorandum read:

> I no longer have confidence in your ability to function as [Heartland's] Police Chief. You have failed to provide leadership and follow instructions. Specifically:
>
> 1. The quality and timeliness of your work products have not been at a level consistent with the requirements of the position.
>
> 2. You have failed to act in a timely and appropriate manner regarding several serious problems in the Police Department.
>
> 3. You have repeatedly failed to keep my office informed of investigations and work practice changes.

Exhibit 4. Stevens placed Boyd on administrative leave on May 5, 2004 and revoked his position on May 19, 2004.

{¶14} On March 27, 2007, Boyd brought suit against ODMH, alleging claims of racial discrimination in violation of R.C. 4112.02 and wrongful discharge in violation of public policy. At trial, Stevens and Boyd testified to the facts recounted above. Further, Stevens expanded on the reasons that she listed in her May 3, 2004 memorandum explaining why she lost confidence in Boyd. Stevens stated that "the major and deciding moment [when her confidence in Boyd] started really going downhill" occurred when Boyd was participating in the transitional work program. (Tr. 283.) The transitional-work-program coordinator reported to Stevens that Boyd had told her that he did not think Stevens would understand if he did not get his work done, so he felt that he had to work additional hours. When Stevens confronted Boyd about this statement, Boyd denied making it. Stevens did not believe that Boyd's denial was truthful.

{¶15} Stevens also testified that Boyd procrastinated in providing other departments with information that they needed. For example, Boyd repeatedly delayed submitting information regarding new hires so that Heartland could order uniforms through the general procurement process. Also, in June 2003, Boyd failed to submit an administrative leave request until the evening before the training session he sought leave to attend with two of his officers. In response to this failure, Stevens completed a "Problem Identification" form that counseled Boyd to submit all requests that required approval well in advance of the event.

{¶16} Additionally, Stevens disapproved of how Boyd disciplined a police officer suspected of verbally abusing a patient. While the abuse incident was being investigated, Boyd counseled the officer using a "Problem Identification" form. Because Heartland could only impose correction for a particular incident once, Boyd's actions short-circuited the investigation process and precluded any more serious discipline.

{¶17} In sum, Stevens testified that Boyd simply did not follow through with the tasks he needed to perform to do his job. Although those tasks included the drafting of the operations manual, Boyd's failure to finish the manual was only one manifestation of a larger problem.

{¶18} Boyd offered explanations for some of the problems that Stevens perceived with his performance. First, Boyd testified that his department was understaffed compared to the police departments of other ODMH facilities like Heartland. Boyd did not have a lieutenant to assist him until ODMH finally hired one in February 2004. Moreover, the 14 committees that Boyd served on, which required him to attend over 40 committee meetings a month, consumed much of Boyd's time. Due to the understaffing and committee demands, Boyd was unable to complete the operations manual by the deadline imposed in his first performance review. However, Boyd contended that he would have finished the manual prior to June 30, 2004—the due date established in his second performance review. Boyd estimated that he had completed over three quarters of the manual before the imposition of administrative leave forced him to stop working on it.

{¶19} Second, Boyd testified that he made Stevens aware of all investigations that his department conducted. On a weekly basis, Boyd provided Stevens with the face sheets of the reports generated by pending investigations. Boyd also discussed those investigations with Stevens in their weekly meetings. According to Boyd, prior to his March 25, 2004 e-mail, he brought up the police department's investigation into B.B.'s escape at one or two of his weekly meetings with Stevens. In response, Stevens directed Boyd to continue to keep her apprised of the investigation. Boyd explained that he sent

the March 25, 2004 email to Stevens after he realized that he had forgotten to brief her on the escape investigation in the meeting that had occurred earlier that day.

{¶20} Third, Boyd addressed the problem with the procurement of uniforms for newly hired police officers. Boyd contended that he could not order a uniform until a newly hired officer began working, but the new hire needed the uniform to function as a police officer. Because the normal procurement process took time, Boyd preferred to purchase the uniforms from a local uniform vendor.

{¶21} On August 19, 2010, the trial court decided Boyd's suit in ODMH's favor. With regard to Boyd's race discrimination claim, the trial court determined that Boyd failed to prove a prima facie case of discrimination because the evidence adduced did not establish that he was qualified for the police chief position. Although the trial court could have stopped there, it continued its analysis under the assumption that Boyd had proved a prima facie case. After considering the legitimate, nondiscriminatory reasons that ODMH offered for its decision to revoke Boyd's position, as well as Boyd's evidence that the proffered reasons were only pretext for unlawful discrimination, the trial court concluded that:

> [T]he overwhelming weight of the evidence demonstrates that defendant's decision to terminate plaintiff's employment was not based upon any consideration of plaintiff's race. Stevens testified credibly that race was not a factor in her decision to terminate plaintiff[.] * * * Plaintiff has brought forth no credible evidence to demonstrate that Stevens' stated reason for plaintiff's termination was a pretext for discrimination. Accordingly, plaintiff cannot prevail on his claim of racial discrimination.

Decision, at 6.

{¶22} Additionally, the trial court rejected Boyd's claim for wrongful discharge in violation of public policy. The trial court concluded that Boyd had not proved either a

clear public policy that his discharge violated or the lack of an overriding legitimate business justification for his discharge.

{¶23} After the trial court reduced its decision to judgment, Boyd filed the instant appeal. Boyd assigns the following errors:

> [1.] THE TRIAL COURT ERRED BY MISAPPLYING THE LAW CONCERNING THE REQUIREMENTS OF THE PRIMA FACIE CASE AND STATING THAT APPELLANT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HE WAS QUALIFIED FOR THE POSITION THAT HE LOST.
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> [2.] THE TRIAL COURT ERRED BY MISCONSTRUING THE LAW AS TO OHIO REVISED CODE SECTION 5101.61 IN THAT THE CODE SECTION DID CONTAIN EDICTS WHICH PROTECTED APPELLANT FROM RETALIATORY CONDUCT BY APPELLEE WHEN HE PRODUCED THE RESULTS OF THE INVESTIGATION WHICH INDICATED THAT AN EMPLOYEE OF THE APPELLEE HAD NEGLECTED A PATIENT OF HEARTLAND BEHAVIORAL CARE CENTER WHEN SHE SENT THE PATIENT WITHOUT A POLICE ESCORT TO A MASSILLON HOSPITAL.
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> [3.] THE TRIAL COURT ERRED BY REFUSING TO ADMIT INTO EVIDENCE THE COMPLETE CONTENTS OF THE POLICE INVESTIGATION REPORT PREPARED BY APPELLANT EVEN THOUGH IT WAS PREPARED IN THE NORMAL COURSE OF BUISNESS OF APPELLEE, THUS, EXCLUDING IT FROM THE HEARSAY RULE ELICITED IN OHIO EVIDENTIARY RULE 801(C).
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> [4.] THE TRIAL COURT ERRED BY REFUSING TO ADMIT INTO EVIDENCE THE REBUTTAL PREPARED BY APPELLANT TO THE PROBLEM IDENTIFICATION REPORT PREPARED BY HELEN STEVENS BECAUSE IT WAS PROPERLY AUTHENTICATED PURSUANT TO OHIO EVIDENTIARY RULE 901(A) BY APPELLANT.

{¶24} By his first assignment of error, Boyd argues that the trial court erred when it determined that he failed to prove a prima facie case of racial discrimination. We agree.

{¶25} Generally, Ohio courts apply federal case law interpreting Title VII of the Civil Rights Act of 1964, 52 U.S.C. 2000e, et seq. to claims alleging violation of R.C. Chapter 4112. *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 196. Therefore, in the absence of direct evidence of discriminatory intent, Ohio courts resolve state claims of disparate treatment racial discrimination using the evidentiary framework first established in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817. *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578, 584, 1996-Ohio-265; *Plumbers & Steamfitters Joint Apprenticeship Committee* at 197.

{¶26} Under the *McDonnell Douglas* evidentiary framework, a plaintiff bears the initial burden of establishing a prima facie case of discrimination. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824. In order to carry this burden, the plaintiff must present evidence that: (1) he is a member of a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position in question, and (4) either he was replaced by someone outside the protected class or a non-protected similarly situated person was treated better. Id. (enumerating slightly different elements, but recognizing that the elements of a prima facie case vary to conform to the facts of the particular case); *Samadder v. DMF of Ohio, Inc.*, 154 Ohio App.3d 770, 2003-Ohio-5340, ¶35. Establishment of a prima facie case "in effect creates a presumption that the employer unlawfully discriminated against the employee." *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 254, 101 S.Ct. 1089, 1094.

{¶27} Once a plaintiff has established a prima facie case, the burden shifts to the employer to rebut the presumption of discrimination by presenting evidence of some legitimate, nondiscriminatory reason for its action. Id.; *McDonnell Douglas*, 411 U.S. at

802, 93 S.Ct. at 1824. Because this burden is one of production (not persuasion), a trier of fact determines whether an employer has produced evidence of a legitimate, nondiscriminatory reason without assessing the credibility of that evidence. *Reeves v. Sanderson Plumbing Prods., Inc.* (2000), 530 U.S. 133, 142, 120 S.Ct. 2097, 2106; *St. Mary's Honor Ctr. v. Hicks* (1993), 509 U.S. 502, 509, 113 S.Ct. 2742, 2748. An employer sustains its burden if it "introduce[s] evidence which, *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action." *St. Mary's Honor Ctr.*, 509 U.S. at 509, 113 S.Ct. at 2748 (emphasis sic).

{¶28} If the employer carries its burden, then the plaintiff must have the opportunity to demonstrate that the reason the employer offered for taking the adverse employment action is actually a pretext for discrimination. *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095. A plaintiff cannot establish that a proffered reason is pretext for discrimination unless the plaintiff shows "*both* that the reason was false, *and* that discrimination was the real reason." *St. Mary's Honor Ctr.*, 509 U.S. at 515, 113 S.Ct. at 2752 (emphasis sic).[4] Thus, in proving to a trier of fact that the employer's proffered reason is pretextual, a plaintiff satisfies his ultimate burden: to persuade the trier of fact that the employer intentionally discriminated against him because of his race. *St. Mary's Honor Ctr.*, 509 U.S. at 511, 113 S.Ct. at 2749.

{¶29} In the case at bar, the trial court found that Boyd proved three elements of the prima facie case. Boyd testified that he is African-American, thus proving the first element—that he is a member of a protected class. Because ODMH terminated Boyd's

[4] Of course, a trier of fact may reasonably infer from the falsity of an explanation that the employer is dissembling to cover up a discriminatory purpose. *Reeves*, 530 U.S. at 147, 120 S.Ct. at 2108. "Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148, 120 S.Ct. at 2109.

employment, he suffered the type of adverse employment action required by the second element. Boyd satisfied the final element of the prima case with his testimony that a Caucasian replaced him as police chief at Heartland. The trial court, however, concluded that Boyd failed to establish the third element with evidence that he was qualified for the police chief position. On appeal, Boyd argues that the trial court erred in basing this conclusion on Stevens' subjective evaluation of Boyd's job performance, instead of considering whether Boyd satisfied the objective criteria for his position.

{¶30} To prove qualification for a position under the third element of the prima facie test, a plaintiff need only show that he or she satisfied the objective criteria necessary for employment in the position. *Wexler v. White's Fine Furniture* (C.A.6, 2003), 317 F.3d 564, 575; *Putney v. Contract Bldg. Components*, 3d Dist. No. 14-09-21, 2009-Ohio-6718, ¶28-29. Restricting the proof required to objective qualifications ensures that a court does not consider an employer's reason for discharging the plaintiff—often based on its subjective evaluation of the plaintiff's job performance—during the prima facie case. If an employer's subjective assessment of an employee could defeat the prima facie case, then the inquiry into possible discrimination would end without affording the employee the opportunity to challenge the subjective assessment as a pretext for discrimination. *Vessels v. Atlanta Indep. School Sys.* (C.A.11, 2005), 408 F.3d 763, 768-69; *Medina v. Ramsey Steel Co.* (C.A.5, 2001), 238 F.3d 674, 681; *Weldon v. Kraft, Inc.* (C.A.3, 1990), 896 F.2d 793, 798-99; *Burrus v. United Tel. Co. of Kansas, Inc.* (C.A.10, 1982), 683 F.2d 339, 342; *Lynn v. Regents of the Univ. of Cal.* (C.A.9, 1981), 656 F.2d 1337, 1344.

{¶31} Consequently, whether an employee possesses a subjective quality, such as a superior's confidence and trust in his performance, is a consideration better left to the later stages of the *McDonnell Douglas* analysis. Id. See also *Chitwood v. Dunbar*

Armored, Inc. (S.D.Ohio 2003), 267 F.Supp.2d 751, 756 (holding that consideration of subjective evaluations during the prima facie case would lead to discrimination claims being " 'decided at the threshold level because the employer can simply state that the plaintiff is 'not meeting expectations' and pile up a myriad of small infractions to demonstrate the employee's failings' "). During the prima facie stage, the court "should focus on criteria such as the plaintiff's education, experience in the relevant industry, and demonstrated possession of the required general skills." *Wexler* at 576. See also *Cicero v. Borg-Warner Automotive, Inc.* (C.A.6, 2002), 280 F.3d 579, 586 ("While prior work history is not probative at the second and third stages of the *McDonnell Douglas* test, common sense dictates that it is relevant at the prima facie stage for determining whether an employee has at least the minimum attributes needed to perform the position.").

{¶32} In the case at bar, the trial court did not address the evidence of Boyd's objective qualifications for the police chief position. Thus, the trial court ignored evidence that Boyd: (1) began working in law enforcement in 1981, (2) served as a police officer with the Akron, Copley Township, and Twinsburg Township police departments, and (3) from 1985 to 2001, worked for Northcoast Behavioral Healthcare (a facility like Heartland), first as a police officer, then a sergeant, and finally, a lieutenant. The trial court also overlooked Stevens' testimony that Boyd was qualified for the police chief position when ODMH hired him.

{¶33} Instead of relying on the foregoing evidence, the trial court considered whether Stevens approved of Boyd's job performance, and it concluded that Boyd was not qualified because Stevens had lost confidence and trust in Boyd. Because the trial court focused on Stevens' subjective evaluation of Boyd, and not whether Boyd met the

objective criteria for the police chief position, the trial court erred in its analysis of the qualification element of the prima facie case.

{¶34} Boyd next argues that this error requires reversal of the trial court's judgment. We disagree. Although the trial court erred in concluding that Boyd failed to prove a prima facie case, it proceeded with the next two steps of the *McDonnell Douglas* analysis under the assumption that Boyd had satisfied his initial burden. Ultimately, the trial court found no evidence that ODMH's reasons for revoking Boyd's position were a pretext for discrimination. The trial court thus concluded that ODMH did not discriminate against Boyd on the basis of his race. Boyd does not assign any error regarding this conclusion on appeal. Without a challenge to this conclusion, we are not required to review it. App.R. 12(A)(1)(b) (requiring appellate courts to determine all appeals "on [their] merits on the assignments of error set forth in the briefs under App.R. 16"). Accordingly, even though we sustain Boyd's first assignment of error, we find that the error does not warrant reversal of the trial court's judgment.

{¶35} By his second assignment of error, Boyd argues that the trial court erred in entering judgment against him on his claim for wrongful discharge in violation of public policy. We disagree.

{¶36} Generally, the common law doctrine of employment at will governs employment relationships in Ohio. *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, ¶6. Under the employment-at-will doctrine, either the employer or the employee may terminate the employment relationship at any time and for any reason. *Lake Land Emp. Group of Akron, LLC v. Columber*, 101 Ohio St.3d 242, 2004-Ohio-786, ¶17. Consequently, when employment is at will, a discharge normally does not give rise to an action for damages. *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-

3994, ¶5. However, if the discharge violates a clear public policy, an employee can maintain a common law action for wrongful discharge in violation of public policy against the employer. *Leininger* at ¶7-8; *Wiles* at ¶5-6.

{¶37} To assert a viable claim for wrongful discharge in violation of public policy, a plaintiff must establish each of the following four elements:

> 1. That [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 to the public policy (the *causation* element).
>
> 4. The employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element).

Collins v. Rizkana, 73 Ohio St.3d 65, 69-70, 1995-Ohio-135 (emphasis sic) (adopting the analysis originally suggested in *Painter v. Graley*, 70 Ohio St.3d 377, 384, 1994-Ohio-334). Of these four elements, the first two (the clarity and jeopardy elements) are questions of law. Id. at 70. The last two (the causation and overriding justification elements) are questions of fact. Id.

{¶38} Under the first element, a plaintiff must identify a clear public policy which the defendant's conduct violated. *Wiles* at ¶13; *Collins* at 70. See also *Painter* at 383 ("[T]o state a claim of wrongful discharge in violation of public policy, a plaintiff must allege facts demonstrating that the employer's act of discharging him contravened a 'clear public policy.' "). To prove that a clear public policy exists, a plaintiff may rely on both state and federal law, including the Ohio and federal Constitutions, statutes, administrative regulations, and common law. *Painter* at paragraph three of the syllabus.

{¶39} Here, Boyd asserts that R.C. 5101.61 establishes a clear public policy that ODMH violated when it revoked his position. Pursuant to R.C. 5101.61(B), "[a]ny person having reasonable cause to believe that an adult has suffered abuse, neglect, or exploitation may report, or cause reports to be made of such belief[,] to the [county] department" of job and family services. R.C. 5101.61(E) prohibits an employer from "discharg[ing], demot[ing], transfer[ring], prepar[ing] a negative work performance evaluation, or reduc[ing] benefits, pay, or work privileges, or tak[ing] any other action detrimental to an employee or in any way retaliat[ing] against an employee as a result of the employee's having filed a report under this section."

{¶40} Based on R.C. 5101.61, we conclude the General Assembly has set forth a clear public policy which forbids an employer from discharging an employee for reporting adult abuse, neglect, or exploitation to the county department of job and family services. ODMH, however, did not violate this clear public policy. As the trial court found, the record contains no evidence that Boyd ever reported any alleged abuse, neglect, or exploitation of a Heartland patient to the county department of job and family services.

{¶41} To overcome this evidentiary deficiency, Boyd urges that this court expand the protection afforded by R.C. 5101.61(E) to employees who report adult abuse, neglect, or exploitation to any person with "the authority to proceed on the issues of neglect and abuse." Appellant's brief, at 23. Boyd reasons that because Stevens had such authority, his report to her that Deal allowed a patient to go to the hospital without a police escort qualifies as protected conduct.[5] We decline to broaden the scope of the public policy instituted by the General Assembly. If we did so, we would, in effect, create new public policy. However, an exception to the employment-at-will doctrine is only justified when a

[5] Boyd alleges that Deal's failure to secure a police escort amounted to neglect of B.B.

discharge of an employee contravenes an *existing* clear public policy. *Collins* at 69 (requiring a plaintiff to prove "[t]hat a clear public policy existed"). See also *Mitchell v. Mid-Ohio Emergency Servs., L.L.C.*, 10th Dist. No. 03AP-981, 2004-Ohio-5264, ¶19-23 (refusing to extend existing public policies to generate a new public policy that would apply to the circumstances of the case before the bar). Accordingly, we overrule Boyd's second assignment of error.

{¶42} By Boyd's third assignment of error, he argues that the trial court erred in excluding from evidence the police investigation report regarding the Heartland patient's escape. We disagree.

{¶43} Decisions regarding the admissibility of evidence are within the sound discretion of the trial court, and a reviewing court can only reverse such decisions if the trial court abused its discretion. *Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St.3d 296, 299 (applying the abuse-of-discretion standard to determine whether the trial court erred in admitting hearsay evidence pursuant to the Evid.R. 803(6) business-record exception). A trial court abuses its discretion if its decision is unreasonable, arbitrary, or unconscionable. *Banford v. Aldrich Chemical Co.*, 126 Ohio St.3d 210, 2010-Ohio-2470, ¶38. Even upon a showing of an abuse of discretion, a reviewing court will uphold a trial court's evidentiary ruling unless an appellant also establishes that the abuse of discretion materially prejudiced him or her. Id.; *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, ¶20. See also *Hilliard v. First Indus., L.P.*, 165 Ohio App.3d 335, 2005-Ohio-6469, ¶41 ("If the party claiming error [in the exclusion of evidence] is unable to establish that the trial court's ruling affects a substantial right, the error is deemed harmless.").

{¶44} The trial court excluded the police investigation report as hearsay. Boyd now argues that the police investigation report is admissible as a business record under the Evid.R. 803(6) exception to the hearsay rule. To qualify for the Evid.R. 803(6) business-record exception: (1) the record at issue must be one regularly recorded in a regularly conducted activity; (2) a person with knowledge of the act, event, or condition recorded must have made the record at issue; (3) the person who made the record must have done so at or near the time of the event recorded; and (4) the party who seeks to introduce the record must lay a foundation through testimony of the record custodian or some other qualified witness. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶171. Even after a party establishes these prerequisites to admission, a court may still exclude the record from evidence if the source of the information or the method or circumstances of preparation indicate lack of trustworthiness. Id.; Evid.R. 803(6).

{¶45} Before application of Evid.R. 803(6) and admission of a business record, the party who seeks to introduce the record must produce "evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). An authenticating witness must demonstrate that he or she is sufficiently familiar with the operation of the business and the preparation, maintenance, and retrieval of the record in order to testify on the basis of this knowledge that the record is what it purports to be and was made in the ordinary course of business. *Jefferson v. Careworks of Ohio, Ltd.*, 10th Dist. No. 10AP-785, 2011-Ohio-1940, ¶11; *John Soliday Financial Group, L.L.C. v. Pittenger*, 190 Ohio App.3d 145, 2010-Ohio-4861, ¶35.

{¶46} In the case at bar, a document entitled "Police Investigation Report" is part of Exhibit 12, a large packet of numerous different documents, which Boyd proffered after the trial court excluded it from evidence. When presented with Exhibit 12 at the trial,

Boyd only identified the first document in the exhibit—the incident report. Boyd did not mention and, consequently, failed to authenticate, the police investigation report, which was the second document contained within Exhibit 12. Moreover, Boyd did not testify that the police investigation report resulted from a regularly conducted business activity or that it was the regular practice of the Heartland police department to make such a report. Nor did Boyd testify about the knowledge base of the person who made the report or whether the report was drafted at or near the time of the patient's escape. Without any such testimony, the record lacks the evidence necessary to establish a foundation for the admission of the police investigation report as a business record. Because Boyd failed to authenticate or lay a foundation for the admission of the police investigation report, the trial court did not err in refusing to allow the report into evidence.

{¶47} Even assuming that the police investigation report constituted admissible evidence, Boyd was not materially prejudiced by the report's exclusion from evidence. Boyd contends that the police investigation report proves that he timely informed Stevens about the police department's ongoing investigation into B.B.'s escape. If this contention were accurate, the report could rebut one of the legitimate, nondiscriminatory reasons that ODMH asserted for the revocation of Boyd's position. However, the police investigation report does not mention, and consequently does not substantiate, the alleged updates that Boyd contends that he gave Stevens during the period of March 11 through 24, 2004. If anything, the report supports Stevens' rendition of events because it states that, on March 26, 2004, Stevens placed the investigation on "hold" after telling Boyd that she was unaware that he had continued the investigation. Accordingly, we overrule Boyd's third assignment of error.

{¶48} By Boyd's fourth assignment of error, he argues that the trial court erred by excluding from evidence a June 16, 2003 memorandum from Boyd to Stevens. The memorandum at issue constitutes Boyd's response to the counseling he received for mishandling the arrangements for him and two Heartland police officers to attend an off-site training session. Stevens decided that Boyd needed counseling after he delayed submitting a request for the necessary administrative leave until the evening before the training session. As part of the counseling, Stevens completed a "Problem Identification" form, which cautioned Boyd to avoid waiting until the last minute to seek approvals. Stevens cited this incident as an example of Boyd's pattern of untimeliness—the first legitimate, nondiscriminatory reason she gave for terminating Boyd's position in the May 3, 2004 memorandum.

{¶49} ODMH objected to the admission of the June 13, 2006 memorandum on the grounds that it was unauthenticated and irrelevant. Under Evid.R. 901(A), a proponent of a document must authenticate that document by introducing evidence sufficient to support a finding that the document is what its proponent claims it to be. A proponent of a document may authenticate it under Evid.R. 901(B)(1) through testimony of a witness who has firsthand knowledge of the execution, preparation, or custody of the document. *Faieta v. World Harvest Church*, 10th Dist. No. 08AP-527, 2008-Ohio-6959, ¶75. Here, Boyd identified the memorandum as his response to the counseling he received regarding his arrangements for the training session. Because Boyd was the author of the memorandum, this testimony authenticated the memorandum.

{¶50} Nevertheless, we cannot find that the trial court abused its discretion in excluding the memorandum from evidence. As we stated above, ODMH objected to the admission of the memorandum for *two* reasons—its lack of authenticity and its

irrelevance to the matter at issue. Boyd's fourth assignment of error, however, only challenges the first reason. Boyd does not assert that the memorandum constitutes relevant evidence. In the absence of such an assignment of error, we decline to reverse the trial court's evidentiary ruling. See App.R. 12(A)(1)(b).

{¶51} Moreover, other reasons exist to reject Boyd's attack on the trial court's decision to exclude the memorandum from evidence. First, the memorandum is inadmissible because it consists entirely of hearsay. The memorandum is an out-of-court statement offered to prove the truth of the matter asserted, i.e., that Boyd had sound rationale for his actions and any failings resulted because Boyd was overworked. Evid.R. 801(C).

{¶52} Second, we are unconvinced that Boyd suffered prejudice due to the exclusion of the memorandum. Stevens only relied on the incident underlying the memorandum as an example of Boyd's untimeliness. In the memorandum, Boyd admits that he submitted the administrative leave forms the evening before the training session. Boyd's only explanation for his tardiness is that he "honestly forgot to complete these forms prior to the aforementioned time." Exhibit 9. Thus, the memorandum does nothing to dispel the veracity of Stevens' assertion that Boyd failed to timely furnish others with necessary information, nor does it otherwise demonstrate that that assertion was a pretext for unlawful discrimination. For all the foregoing reasons, we overrule Boyd's fourth assignment of error.

{¶53} In sum, we overrule Boyd's second, third, and fourth assignments of error. Although we sustain Boyd's first assignment of error, we conclude that the trial court's

error does not provide a basis for reversal of the judgment. Accordingly, we affirm the judgment of the Ohio Court of Claims.

Judgment affirmed.

BRYANT, P.J., and SADLER, J., concur.