

JAN 27 2023

### **Standard**

“‘A Civ.R. 12(B)(6) motion to dismiss is procedural and tests the sufficiency of the complaint.’ To dismiss a complaint under Civ.R. 12(B)(6), ‘It must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to the relief sought.’ In considering the motion, the court must accept as true all factual allegations in the complaint and construe any reasonable inferences in favor of the non-moving party. ‘In general, a Civ.R. 12(B)(6) motion is viewed with disfavor, rarely granted and reserved for those cases that cannot possibly succeed.’” (Citations omitted). *Valentine v. Cedar Fair, L.P.*, 2021-Ohio-2144, 174 N.E.3d 900, ¶ 22 (6th Dist.). Ohio is a notice-pleading state and does not generally require a plaintiff to plead operative facts with particularity. *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.3d 1136, ¶ 29.

R.C. 5123.61(L) provides that “[n]o employer or any person with the authority to do so shall discharge, demote, transfer, prepare a negative work performance evaluation, reduce pay or benefits, terminate work privileges, or take any other action detrimental to an employee or retaliate against an employee as a result of the employee’s having made a report under this section.”

### **Analysis**

The parties agree that the statute does not clearly provide for a private cause of action to enforce R.C. 5123.61(L). R.C. 5123.64 provides a remedy for a person with a developmental disability if R.C. 5123.61 is violated, which includes “the filing of a legal action to enforce rights or to recover damages for violation of rights.” Violating other sections of R.C. 5123.61 constitute crimes but R.C. 5123.61(L) is not included in this remedy.

Plaintiff asks this Court to find that an implied cause of action is contained within R.C. 5123.61(L). “In determining whether a private right of action should be inferred from a statute, Ohio courts have relied on a three-part test adapted from the United States Supreme Court decision in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975).” *Anderson v. Smith*, 196 Ohio App.3d 540, 2011-Ohio-5619, 964 N.E.2d 468, ¶ 10 (10th Dist.). “The test examines: (1) whether the statute creates a right in favor of plaintiff, (2) whether there is any indication of legislative intent, explicit or implicit, to create or deny a remedy through private right of action, and (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy.” *Id.*

However, it appears the implied cause of action doctrine is no longer favored in the law. More than a decade ago the Eighth District found that “[t]here is ample authority for the proposition that the *Cort* test is no longer valid. The United States Supreme Court has gradually focused on the single factor of whether there was a legislative intent to grant a private cause of action.” *Grey v. Walgreen Co.*, 197 Ohio App.3d 418, 2011-Ohio-6167, 967 N.E.2d 1249, ¶ 8 (8th Dist.).

Justice Kennedy of the Ohio Supreme Court recently remarked in a concurrence “[t]he idea that a court should read between the lines of statutory text to recognize an implied cause of action is a relic from a different time.” *City of Maple Heights v. Netflix, Inc.*, 2022-Ohio-4174, ¶ 35, citing *Alexander v. Sandoval*, 532 U.S. 275, 287, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). She also found that the Ohio Supreme Court has very rarely utilized the doctrine and found that the doctrine “runs counter to the basic theory of the tripartite form of government.” *Id.* at ¶ 38. As such, the Court will not utilize the test as announced in *Anderson* and determine that an implied cause of action exists in R.C. 5123.61(L).

The Court declines to search for an implied cause of action, and even it were to utilize the test in *Anderson*, the Court would not find that an implied cause of action exists. The legislature clearly intended for certain remedies to exist throughout Chapter 5123 but did not provide a remedy specifically for R.C. 5123.61(L). The legislature even determined that violations of R.C. 5123.61 warranted a criminal charges if the plaintiff was a person with developmental disabilities. However, the legislature did not extend those remedies to employees who have been retaliated against under R.C. 5123.61(L). As such, there is no clear legislative intent to include the remedy that Plaintiff seeks. The motion to dismiss is hereby found well-taken and count one of the complaint is dismissed.

As the Court has found that no implied cause of action exists under R.C. 5123.61(L), the Court will not consider whether Plaintiff engaged in protected activity under that section.

#### **JUDGMENT ENTRY**

Defendant's motion to dismiss is hereby found well-taken and is **GRANTED**. Count One of Plaintiff's complaint is hereby **DISMISSED WITHOUT PREJUDICE**.



JUDGE ERIC ALLEN MARKS