COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

JAMES SMITH	**:**	
Plaintiff	**:**	**CASE NO. 2011 CVH 01952**
vs.	**:**	**Judge McBride**
PIERCE TOWNSHIP	**:**	**DECISION/ENTRY**
Defendant	**:**	

FRANCES S. KELLY, et al.,	**:**	
Plaintiffs	**:**	**CASE NO. 2012 CVH 01285**
vs.	**:**	**Judge McBride**
PIERCE TOWNSHIP, et al.,	**:**	**DECISION/ENTRY**
Defendants	**:**	

W. Kenneth Zuk, attorney for the plaintiffs James Smith and Frances Kelly, 3487 St. Annes Turn, Cincinnati, Ohio 45245.

Schroeder, Maundrell, Barbiere & Powers, Lawrence E. Barbiere and J. Michael Morgalis, attorneys for the defendants Pierce Township and Bonnie Batchler, 5300 Socialville-Foster Road, Suite 200, Mason, Ohio 45040.

This cause is before the court for consideration of the following: (1) a motion for summary judgment filed by the defendant Pierce Township in case number 2011 CVH 1952; (2) a motion for summary judgment filed by the defendants Pierce Township and Bonnie Batchler in case number 2012 CVH 1285; (3) a motion for partial summary judgment filed by the plaintiff Frances Kelly in case number 2012 CVH 1285; and (4) a motion to strike affidavits filed by Pierce Township and Bonnie Batchler.

The court scheduled and held a hearing on the motions on July 22, 2013. At the conclusion of that hearing, the court took the issues raised by the motions under advisement.

Upon consideration of the motions, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, the and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

The plaintiff James Smith became Pierce Township's Chief of Police on August 16, 2001.[1] Smith's office was located in the Pierce Township administration building.[2] The main door to Smith's office had a window made of frosted glass with a thin plain glass border, and a set of blinds was located over the window on the inside of the door.[3] There was also a second entrance to Smith's office.[4] To Smith's knowledge, three

[1] Deposition of James Smith, Volume I, at pg. 19.
[2] Id. at pg. 20.
[3] Id. at pgs. 23-24 and Plaintiff's Exhibits 14 and 15.
[4] Id. at pg. 75.

people had keys to his office – Smith, the plaintiff Frances Kelly, and an agent from BCI.[5]

Frances Kelly was hired as the law director for Pierce Township on September 16, 2010 via a letter of engagement signed by Kelly.[6] The letter set forth an agreement for a 180-day term of service at a fixed weekly rate of compensation.[7] In early March 2011, Kelly notified the Board of Trustees of Pierce Township and the township's fiscal officer that the 180-day term was set to expire on March 15, 2011.[8] Kelly provided a draft proposal for the continuation of her services and outlined the benefits and drawbacks to different types of employment options.[9]

On April 12, 2011, Kelly and Pierce Township entered into a professional services agreement which states that "[t]he Board hereby retains Kelly to serve as Township Law Director for a period of three (3) years, beginning May 1, 2011 through and including April 30, 2014.[10] The agreement contains a "Financial Hardship Re-Negotiation ('Escape Clause')" which states in pertinent part as follows:

> " * * * [T]he parties agree that, in the event that the economic factors specified below should converge, the terms of this contract shall be deemed impossible for the Township to fulfill. The parties further recognize that, should this Agreement become impossible to fulfill, the Township will nonetheless continue to require legal services and that Kelly will be in the position most advantageous to the Township to continue to provide such legal services due to familiarity with pending and threatened lawsuits and the particular problems and challenges experienced by the Township. Therefore, in the event that this 'escape clause' should be activated by the following conditions converging, the parties agree to re-

[5] Id. at pg. 76.
[6] Deposition of Frances Kelly at pg. 17 and Defendant's Exhibit 8.
[7] Defendant's Exhibit 8.
[8] Defendant's Exhibit 9.
[9] Id. and Deposition of Frances Kelly at pg. 36.
[10] Defendant's Exhibit 10.

> negotiate the terms of this Agreement for Professional Services in good faith. This means that the parties agree to expend their best efforts to arrive at reasonable but decreased amount of pay and possible changes in other terms, considering the economic condition of the Township and the value of services to be provided."[11]

The agreement also contains a renewal clause which provides that renewal is at the Township's option and, provided Kelly gives the Board notice that the agreement is getting ready to expire, the agreement would be deemed renewed unless the Board gave Kelly notice of nonrenewal within a certain time frame.[12]

Kelly frequently used the key to Smith's office during her tenure as law director, often to retrieve files from Smith's office.[13] She also used the office on several occasions to "seek refuge" while at work when she was going through trying emotional issues.[14]

On May 29, 2011, Kelly received a call from Smith while he was at the airport returning from vacation.[15] The two agreed to meet the next day to talk about several legal issues, including allegations made against Officer Pennekamp.[16] On May 30th, Kelly entered Smith's office using her key and waited for him to arrive.[17] Kelly and Smith talked about several issues for almost an hour while the door to Smith's office was left open.[18] When Kelly wanted to move on to speak about Officers Pennekamp and Bachman, she closed the door and the two continued their discussion.[19]

---

[11] Id.
[12] Id.
[13] Kelly Depo. at pgs. 67-68.
[14] Affidavit of Frances Kelly at ¶¶ 32-34.
[15] Kelly Depo. at pg. 101.
[16] Id. at pgs. 103 and 106.
[17] Id. at pgs. 115-116.
[18] Id. at pg. 120.
[19] Id.

Sometime after closing the door, Kelly walked over toward the office desk and was standing near it when Smith kissed her.[20] Kelly, who was wearing a skirt that day, testified that she was leaning back and fell backward on the desk while Smith was moving toward her and that he pulled her into a sitting position and kissed her.[21] Kelly kissed Smith back and the two had their arms around each other, hugging each other, and then the kiss ended.[22] Smith and Kelly both estimate that the kissing lasted approximately one to two minutes.[23]

This was not the first occasion that Smith and Kelly kissed in Smith's office. There were four or five other times that the two kissed in the office between February and April or May, 2011.[24]

After the kiss ended and Kelly and Smith resumed talking about work issues, Officers Schuller, Pennekamp, and Bachman entered the office (through the door which was open once again) and asked to speak with Smith privately.[25] After Kelly exited the office, the three officers had a conversation with Smith in which they informed him that they saw the kissing going on between Smith and Kelly in Smith's office that day.[26] Smith later discovered that this conversation was recorded.[27]

During the conversation, Bachman indicated that he had looked in the window and had observed Kelly on the desk.[28] Officer Pennekamp also indicated that what he

[20] Id. at pg. 121 and Smith Depo. at pg. 96.
[21] Id. at pgs. 121-122 and 124.
[22] Id. at pg. 122.
[23] Id.at 128; and, Smith Depo. at pg. 99.
[24] Id. at pgs. 79, 83, 86, 95, and 100; and, Smith Depo. at pgs. 108-114.
[25] Id. at pg. 129.
[26] Smith Depo. at pg. 124.
[27] Id. at pg. 120.
[28] Id. at pg. 124.

saw was inappropriate.[29] He stated that he saw Kelly on the desk with her legs spread and her skirt pulled up but Smith denied at his deposition that Kelly's skirt was pulled up.[30] Smith also assured the officers that there was no sex between him and Kelly.[31] The conversation between Smith and the three officers lasted approximately fifteen to twenty minutes.[32]

Officer Pennekamp indicated during testimony in a prior action that he routinely saw officers bent over looking into the chief's office by the door.[33] He stated that officers would routinely use a gap in the blind to peer into the office before knocking on the door to see if Smith was in a meeting or was on the phone.[34]

After the officers left Smith's office, Kelly returned to the office and Smith informed her that the officers had seen them kissing.[35] Smith then called David Elmer, the Pierce Township administrator, and asked him to come into work so he could speak to him.[36] While waiting for Elmer to arrive, Smith again met with the three officers in his office and the officers told Smith he should resign or retire, and Smith informed them that he was not going to do so.[37] Smith also asked the officers how they could see into his office and they said that they could see through a tiny sliver or crack if they got into the right position.[38]

---

[29] Id. at pg. 128.
[30] Id. at pg. 126.
[31] Id. at pg. 124.
[32] Id. at pg. 133.
[33] Trial Transcript, 2011 CVH 1138, Volume III, pgs. 124-125.
[34] Id. at pg. 128.
[35] Id. at pg. 140; and, Kelly Depo. at pg. 131.
[36] Id. at pg. 142.
[37] Id. at pg. 146.
[38] Id. at pg. 147.

Smith and Kelly met Elmer in his office that afternoon and related that they had kissed and that officers had observed this interaction.[39] Elmer then met with the officers to hear what they had observed.[40] In that meeting, the three officers informed Elmer that there were several instances, including on that day, in which they had observed Smith and Kelly "involved in a physical relationship" in Smith's office.[41] The officers defined "physical relationship" as hugging and kissing.[42] They indicated that they saw Smith and Kelly in positions that were sexual in nature and that there was loud kissing that could be heard outside of the office.[43] When asked how they observed these things, the officers said they saw it through the door.[44] However, the officers related that they did not witness any intercourse or any clothes being off.[45]

Elmer then met with Smith and Kelly a second time and advised Smith that he should not return from his vacation immediately.[46] Elmer also told Kelly to "make herself scarce" for a few days if possible while he discussed this issue with the trustees.[47] Elmer met with Trustee Bonnie Batchler on May 31st and informed her about the situation.[48]

A special meeting was noticed for the afternoon of June 3rd "[t]o announce the retirement of Police Chief Col. James T. Smith; to enter into executive session to discuss personnel matters – employment/appointment/compensation/promotion and

[39] Id. at pg. 144.
[40] Deposition of David Elmer at pg. 14.
[41] Id. at pg. 15.
[42] Id.
[43] Id.
[44] Id. at pg. 16.
[45] Id.
[46] Smith Depo. at pg. 156.
[47] Kelly Depo. at pg. 136.
[48] Deposition of Bonnie Batchler at pg. 7.

legal matters; and to discuss any other matters before the board."[49] Smith had indicated to Elmer prior to this date that he did not intend to retire.[50] Prior to the meeting, Batchler met with the three officers and, while speaking with Lieutenant Bachman, she told him that if he and the other two officers provided written statements that she would get them to the prosecutor.[51] Batchler also met with Smith prior to the meeting.[52] Furthermore, on two or three occasions, Batchler met with Karen Register, fiscal officer for Pierce Township, during which time Batchler related to Register what the officers told her about witnessing improprieties between Smith and Kelly.[53]

On June 3rd, the Pierce Township Board of Trustees held a lengthy executive session, wherein several officers were allowed in to testify.[54] When the Board came out of executive session, Batchler said that there would be no further discussions. Curt Hartman, a local attorney, stood up and asked what the Board was going to do about the "gross sexual misconduct" between the Chief and the law director.[55] In response, Batchler said that they were not going to discuss that.[56]

Smith testified that, after the June 3rd meeting, he met with Elmer, Batchler, and Trustee Christopher Knoop, and Knoop told him that he would not be coming back.[57] Smith stated there was discussion about what type of time he could continue to take

[49] Elmer Depo. at pg. 30 and Plaintiff's Exhibit 2.
[50] Id. at pg. 33; and, Smith Depo. at pgs. 167-168.
[51] Batchler Depo. at pgs. 10-11.
[52] Id. at pg. 17.
[53] Affidavit of Karen Register (filed April 30, 2013) at ¶¶ 2 and 4-5. (Note: there is no paragraph 3 in the affidavit.)
[54] Id. at pgs. 11 and 14; and Kelly Depo. at pg. 143.
[55] Id. at pg. 12.
[56] Smith Depo. at pg. 175.
[57] Id. at pgs. 179-180.

and it was decided that he could take sick time and he was told to submit his paperwork.[58] Smith says that he was, in fact, sick during the time of his FMLA leave.[59]

A special meeting was scheduled for June 20th and the noticed purpose was "to enter into executive session to discuss personnel matters – discipline/dismissal and any other matters to come before the board."[60] Another special meeting was noticed for June 24th "to enter into executive session to discuss personnel matters – discipline/dismissal and any other matters to come before the board."[61]

On June 27th, David Elmer sent an email to Smith responding to a June 24th records request and responding to Smith's statement that he wanted to clear his name.[62] In the email, Elmer indicated that the township was scheduling a name-clearing hearing for July 6th.[63] Notice of a special meeting for July 6th was published which stated that the purpose for said meeting was "to conduct a Name-Clearing Hearing as requested by Pierce Township Police Chief James Smith and to enter into Executive Session to discuss personnel matters – discipline/dismissal – ORC 121.22(G)(1); and to discuss any other matter before the Board.[64]

At the July 6th meeting, counsel for Smith appeared and stated that a name-clearing hearing would not be required at that time.[65] A meeting was scheduled for August 24th but the Board received notice prior to the hearing that Smith would not be attending the hearing.[66]

---

[58] Id. at pg. 181.
[59] Id. at pg. 182.
[60] Plaintiff's Exhibit 2.
[61] Id.
[62] Smith Depo. at pg. 176.
[63] Id.
[64] Plaintiff's Exhibit 2.
[65] Smith Depo. at pg. 185.
[66] Id. at pg. 186.

Smith was terminated from his position on August 25, 2011.[67] Kelly was kept on as law director until the end of January 2012, when the Board voted to terminate her.[68]

STANDARD OF REVIEW

The court must grant summary judgment, as requested by a moving party, if "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion."[69]

The court must view all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party.[70] Furthermore, the court must not lose sight of the fact that all evidence must be construed in favor of the nonmoving party, including all inferences which can be drawn from the underlying facts contained in affidavits, depositions, etc.[71]

Determination of the materiality of facts is discussed in *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211:

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the

[67] Batchler Depo. at pg. 37.
[68] Id. at pg. 39 and Elmer Depo. at pgs. 96-97.
[69] Civ. R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Davis v. Loopco Indus., Inc.* (1993), 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144.
[70] *Engel v. Corrigan* (1983), 12 Ohio App.3d 34, 35, 465 N.E.2d 932; *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12-13, 467 N.E.2d 1378; *Welco Indus. Inc. v. Applied Cas.* (1993), 67 Ohio St.3d 344, 356, 617 N.E.2d 1129; *Willis v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 188, 497 N.E.2d 1118; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152, 309 N.E.2d 924.
[71] *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485, 696 N.E.2d 1044, citing *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123.

> outcome of the suit under the governing law will properly preclude the entry of summary judgment."[72]

Whether a genuine issue exists meanwhile is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law[?]"[73] "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[74]

The burden is on the moving party to show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law.[75] This burden requires the moving party to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[76]

A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.[77] The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its

---

[72] *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.
[73] Id. at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.
[74] Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.
[75] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3fd 157, 161, 553 N.E.2d 597; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.
[76] *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.
[77] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164.

case.[78] Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims.[79]

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[80] However, if the moving party satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.[81] The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.[82] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which that (the nonmoving) party bears the burden of production at trial."[83]

The nonmovant must present documentary evidence of specific facts showing that there is a genuine issue for trial and may not rely on the pleadings or unsupported allegations.[84] Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must show affirmatively that the affiant is competent to testify on the matters stated therein.[85]

---

[78] Id.
[79] Id.
[80] Id.
[81] Id.
[82] *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.
[83] *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus; *Welco Indus., Inc. v. Applied Companies* (1993), 67 Ohio St.3d 344, 346, 617 N.E.2d 1129; *Gockel v. Ebel* (1994), 98 Ohio App.3d 281, 292, 648 N.E.2d 539.
[84] *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.
[85] Civ.R.56(E); *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 646, 662 N.E.2d 1112; *Smith v. A-Best Products Co.* (Feb. 20, 1996), 4th Dist. No 94 CA 2309, unreported.

"Personal knowledge" is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[86]

Accordingly, affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R.56(E), which sets forth the types of evidence which may be considered in support of or in opposition to a summary judgment motion.[87]

Under Civ.R.56(C), the only evidence which may be considered when ruling on a motion for summary judgment are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." These evidentiary restrictions exist with respect to materials which are submitted both in support of and in opposition to a motion for summary judgment.

Where the copy of a document falls outside the rule, the correct method for introducing such items is to incorporate them by reference into a properly framed affidavit.[88] Thus, Civil Rule 56(E) also states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must

---

[86] *Carlton v. Davisson*, 104 Ohio App.3d at 646, 662 N.E.2d at 1119; *Brannon v. Rinzler* (1991), 77 Ohio App.3d 749, 756, 603 N.E.2d 1049.
[87] *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.
[88] *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, 590 N.E.2d 411; *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 222, 515 N.E.2d 632.

be resolved in favor of the nonmoving party.[89] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[90]

However, the summary judgment procedure is appropriate where a nonmoving party fails to respond with evidence supporting his claim(s). While a summary judgment must be awarded with caution, and while a court in reviewing a summary judgment motion may not substitute its own judgment for the trier of fact in weighing the value of evidence, a claim to survive a summary judgment motion must be more than merely colorable.[91]

In deciding a summary judgment motion, the court may, even if summary judgment is not appropriate upon the whole case, or for all the relief demanded, and a trial is necessary, grant a partial summary judgment, such that a trial will remain necessary as to the remaining controverted facts.[92]

LEGAL ANALYSIS

I. 2011 CVH 1952

In a written decision filed of record on March 21, 2013, this court granted summary judgment to Pierce Township on, at that time, the sole claim against it for

[89] *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[90] *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150.
[91] *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d at 111, 570 N.E.2d at 1099.
[92] Civ.R.56(D); *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 834, 621 N.E.2d 802.

wrongful discharge. The court found that Smith served at the pleasure of the board and that the board had unilateral authority to terminate him without cause.

In that same decision, the court granted Smith's motion for leave to file an amended complaint. The amended complaint added new allegations that Smith was denied rights conferred by the Pierce Township Personnel Policies Manual and added a demand for relief for back pay and benefits.[93]

The Pierce Township Personnel Policies Manual states in pertinent part as follows:

> "1.1 * * * This Personnel Policies Manual ('the Manual') is applicable to all Pierce Township ('the Township') employees. This Manual establishes personnel procedures, policies, work rules, regulations, practices, benefits, responsibilities and opportunities available to Township employees. This document does not constitute an employment contract. Employment with the Township is at-will.
>
> * * *
>
> 1.8 * * * Information included in this Manual and/or any performance evaluation system is not to be considered a contract and may be changed by the Board in accordance with Article I, Section 1.3 Amendments.
>
> * * *
>
> 1.12 Definitions
>
> * * *
>
> Department Head – Department Heads are the Fire Chief, Police Chief, Public Works Director, and Zoning Manager.
>
> * * *
>
> 3.3.2 Board of Trustees' Disciplinary Authority

[93] Plaintiff's First Amended Complaint, filed January 7, 2013.

> The Board may enforce any disciplinary action, including termination. The Board shall approve, disapprove or modify disciplinary recommendations presented by the Township Administrator that involve employee suspension, demotion, compensation reduction or termination.
>
> * * *
>
> 3.4 Appeal Procedure
> Except for Department Heads, certified police officers and fire personnel, an employee aggrieved by either a suspension * * * or a change of status may appeal * * *[.]"[94]

The analysis to be applied with respect to this matter is set forth by the Twelfth District Court of Appeals in *Curry v. Blanchester* (July 19, 2010), 12th Dist. Nos. CA2009-08-010 and CA2009-08-012, 2010-Ohio-3368. In this regard, Ohio law holds that "[t]he provisions of an employee handbook will alter the terms of an at-will employment relationship only if the employer and the employee have agreed to create a contract from the writing."[95] "In the absence of mutual assent, a handbook is simply a unilateral statement of rules and policies that create no obligations or rights."[96] "Courts have held that where there exists at-will language in an employment application and manual, as well as disclaimer language disavowing statements to the contrary, there can be no inference of contractual obligations between the parties."[97]

The plaintiff has failed to demonstrate how this case is distinguishable from the analysis set forth in *Curry v. Blanchester*. There was no manifested mutual assent by Pierce Township and the plaintiff that the employee handbook would alter the terms of his at-will employment or create any contractual obligations. As an at-will employee,

---

[94] Defendant's Exhibit 5.
[95] See, e.g., *Curry v. Blanchester* (July 19, 2010), 12th Dist. Nos. CA2009-08-010 and CA2009-08-012, 2010-Ohio-3368, ¶ 73, citing *McIntosh v. Roadway Express, Inc.* (1994), 94 Ohio App.3d 195, 210, 640 N.E.2d 570.
[96] Id.
[97] *Crase v. Shasta Beverages, Inc.* (Jan. 31, 2012), 10th Dist. No. 11AP-519, 2012-Ohio-326, ¶ 28, citing *Fennessey v. Mt. Carmel Health Sys., Inc.*, 10th Dist. No. 08AP–983, 2009–Ohio–3750, ¶ 8, citing, *Mastromatteo v. Brown & Williamson Tobacco,* 2d Dist. No. 20216, 2004–Ohio–3776, ¶ 18.

James Smith did not have a property interest in his continued employment and was not entitled to any of the procedures set forth in the handbook prior to termination.[98]

Additionally, while the plaintiff states in his memorandum opposing summary judgment that he was not paid for accumulated sick leave in violation of Section 5.7.2 of the policy manual, the court was unable to find evidence of this fact in the record, either in testimony or documentary evidence. Smith did testify that he was told to go on sick leave by Trustee Knoop and/or David Elmer after the June 3rd meeting, but he also testified that he was, in fact, sick during this time. The plaintiff has failed to demonstrate that any genuine issue of material fact remains with regard to his request for back pay.

As a result, the defendant's motion for summary judgment as to the remaining claims against it is well-taken and shall be granted.

II. 2012 CVH 1285

(A) MOTION TO STRIKE

As noted above, "[t]o be considered in a summary judgment motion, an affidavit 'shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated in the affidavit.' "[99] "Personal knowledge is defined as 'knowledge of the

[98] *Curry* at ¶¶ 75-78.
[99] *Wells Fargo v. Smith* (March 11, 2013), 12th Dist. No. CA2012-04-006, 2013-Ohio-855, ¶ 15, quoting Civ.R. 56(E).

truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay.' "[100]

(i) AFFIDAVIT OF GREGORY CONRAD

Conrad's opinion of the import of the manual has no bearing on the actual language in the manual and the legal significance thereof. The statements included in Conrad's affidavit that offer a legal conclusion as to the legal significance of the employee manual are hereby stricken.

The opinion of Conrad as to the intention of the parties when entering into Kelly's employment contract is not a legal conclusion but is, instead, parol evidence regarding the intent of the contract. As set forth below in the breach of contract section, the court did not have the need to use parol evidence in discerning the intent of the contracting parties in this case. However, this is not a basis to strike these statements from the record.

The statements regarding advice given to the board by its legal counsel must be stricken. The client in that instance would not be Conrad as an individual trustee but the board as a whole.[101] "The county prosecutor is counsel to the board, not any individual trustee. Therefore, the decision of an individual trustee to testify about what went on at a meeting does not waive the privilege of the board as a whole."[102]

Much of the information contained in Conrad's affidavit was found by the court to be irrelevant to the issues in the case at bar and was not considered to be of any

[100] Id. at ¶ 16.
[101] *Carver v. Deerfield Twp.*, 139 Ohio App.3d 64, 77, 742 N.E.2d 1182 (Ohio App. 11th Dist., 2000).
[102] Id.

consequence to the present motion. Due to the fact that these statements were not deemed to be of relevance to the consideration of the present motions, the information contained therein was not included in the statement of facts as set forth above.

(ii) AFFIDAVIT OF FRANCES KELLY

For the same reasons discussed in the previous section, all parol evidence regarding the contract at issue was not utilized by the court but will not be ordered to be stricken.

Legal opinions set forth in the affidavit as to whether the contract is legally binding are ordered stricken.

The statements set forth by Kelly regarding her use of Smith's office and her activities in said office are proper testimony and the court finds no reason to strike these paragraphs.

The statements set forth in Paragraph Forty-One are purely speculative and the affiant has no personal knowledge on which to base these statements. As such, this paragraph is ordered stricken.

Much of the remaining information contained in Kelly's affidavit was found by the court to be irrelevant to the issues in the case at bar and was not considered to be of any consequence to the present motion. Due to the fact that these statements were not deemed to be of relevance to consideration of the present motions, the information contained therein was not included in the statement of facts as set forth above.

(iii) AFFIDAVIT OF JAMES SMITH

Portions of Smith's affidavit set forth information about his expectation of privacy in his office. The court finds that this is not a legal conclusion and that information in the affidavit shall not be stricken.

Paragraph Twenty-Seven is merely a legal conclusion and is ordered stricken. Paragraph Thirty-Four is ordered stricken as to the discussion of what was "universally accepted."

Paragraphs Twenty-Nine through Thirty-Two do not contain legal conclusions but rather contain admissible testimony and shall not be stricken.

Much of the remainder of the information in Smith's affidavit relates to conversations he had with other officers and public officials in his office. This information was examined by the court and was deemed not to be relevant to the issues in the case at bar.

(iv) AFFIDAVIT OF DAVID LUKE

Much of Luke's affidavit offers opinions as to what is "usual and customary" or common police department protocol. Legal conclusions are also set forth in this affidavit.

David Luke was not disclosed in this case as an expert pursuant to the required deadlines. As a result, the court will order his affidavit stricken from the record.

The court also notes that, even if the affidavit had not been stricken, the information set forth therein was irrelevant to the issues before the court and would have had no bearing on the outcome of the present motions.

(B) IMMUNITY

(i) PIERCE TOWNSHIP

Pierce Township and Bonnie Batchler first argue that they are each entitled to immunity pursuant to R.C. Chapter 2744.

Generally, " '[d]etermining whether a political subdivision is immune from tort liability pursuant to R.C. Chapter 2744 involves a three-tiered analysis[,]'" in which a court looks to R.C. 2744.02(A)(1), then to the exception set forth in R.C. 2744.02(B), and finally to the defenses set forth in R.C. 2744.03.[103] "The first tier is the general rule that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function."[104] This immunity would apply in the case at bar.

"The second tier of the analysis requires a court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political subdivision to liability."[105] R.C. 2744.02(B) states as follows:

---

[103] *Cramer v. Auglaize Acres* (2007), 113 Ohio St.3d 266, 865 N.E.2d 9, 2007-Ohio-1946, ¶ 14-17, quoting *Greene Cty. Agricultural Soc. v. Liming* (2000), 89 Ohio St.3d 551, 556–557, 733 N.E.2d 1141; and *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 28, 697 N.E.2d 610.
[104] Id. at ¶ 14.
[105] Id. at ¶ 15.

“(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent

> failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.
>
> (4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.
>
> (5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term 'shall' in a provision pertaining to a political subdivision."

The plaintiffs have failed to argue that any of the exceptions set forth in R.C. 2744.02(B) apply and, as such, Pierce Township is generally entitled to immunity in the case at bar.

However, in the present case, the plaintiffs argue that R.C. 2744.09(B) applies to except their claims from political subdivision immunity. R.C. 2744.09(B) states in pertinent part as follows:

> "This chapter does not apply to, and shall not be construed to apply to, the following:
>
> * * *
>
> (B) Civil actions by an employee * * * against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision."

In the recent case of *Sampson v. Cuyahoga Metro. Hous. Auth.* (2012), 131 Ohio St.3d 418, 966 N.E.2d 247, 2012-Ohio-570, the court held that "[w]hen an employee of a political subdivision brings a civil action against the political subdivision alleging an intentional tort, that civil action may qualify as a 'matter that arises out of the employment relationship' within the meaning of R.C. 2744.09(B)."[106] The court further explained that "[a]n employee's action against his or her political-subdivision employer arises out of the employment relationship between the employee and the political subdivision within the meaning of R.C. 2744.09(B) if there is a causal connection or a causal relationship between the claims raised by the employee and the employment relationship."[107] The plaintiff in the *Sampson* case produced evidence that "the alleged tort arose from an accusation by the employer that the employee had stolen from the employer by using the employer-owned gasoline credit cards for personal needs[,]" and that the investigation was conducted entirely by his employer and his arrest occurred at a mandatory employee meeting.[108] The court held that reasonable minds could

[106] *Sampson v. Cuyahoga Metro. Hous. Auth.* (2012), 131 Ohio St.3d 418, 966 N.E.2d 247, 2012-Ohio-570, paragraph one of the syllabus.
[107] Id. at paragraph two of the syllabus.
[108] Id. at ¶¶ 20-21.

conclude that the plaintiff's claims arose out of his employment relationship with the defendant.[109]

The court finds that *Sampson* is applicable to the present action and that R.C. 2744.09(B) operates to except the plaintiffs' intentional tort claims from political subdivision immunity. The court notes that not all of the causes of action set forth in the complaint are intentional torts. However, for the purpose of addressing all of the arguments raised in these motions, the court will address all of the claims set forth in the complaint in the sections below.

(ii) BONNIE BATCHLER

Bonnie Batchler, as a township trustee, falls under the definition of "employee" as set forth in R.C. 2744.01(B). Pursuant to R.C. 2744.03(A)(6):

> "(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:
>
> * * *
>
> (6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:
>
> (a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

[109] Id. at ¶ 19.

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner."

"R.C. Chapter 2744 does not define the type of employee acts that fall 'manifestly outside the scope of employment or official responsibilities' under R.C. 2744.03(A)(6)(a)."[110] "However, Ohio courts have generally drawn from agency-law principles to hold that 'conduct is within the scope of employment if it is initiated, in part, to further or promote the master's business.' "[111] "In the context of immunity, '[a]n employee's wrongful act, even if it is unnecessary, unjustified, excessive or improper, does not automatically take the act manifestly outside the scope of employment.' "[112] " 'It is only where the acts of state employees are motivated by actual malice or other [situations] giving rise to punitive damages that their conduct may be outside the scope of their state employment.' "[113]

In the case at bar, the plaintiff is generally arguing that two acts by Batchler are actionable. One is her act of instructing the officers to provide written statements regarding what they saw. Batchler did so after the officers' allegations regarding Smith's and Kelly's behavior had come to light and the issue of the continued employment of these individuals was headed for review in executive session. Asking relevant witnesses to provide written statements was within the scope of Batchler's employment as a trustee. Additionally, this request was made for a legitimate purpose and there has been no demonstration that it was done with malice, in bad faith, or in a wanton or reckless manner.

---

[110] *Curry*, supra, at ¶ 30.
[111] Id., quoting *Jackson v. McDonald* (2001), 144 Ohio App.3d 301, 307, 760 N.E.2d 24; and *Chesher v. Neyer* (C.A.6, 2007), 477 F.3d 784, 797.
[112] Id., quoting *Jackson* at 307.
[113] Id.

The second act by Batchler at issue is her recounting of the statements of the officers to Karen Register, the Pierce Township fiscal officer. At the time of these conversations, the continuing employment of both Smith and Kelly was at issue. The situation arose because of the actions of Smith and Kelly in Smith's office and the officers' communications to David Elmer and to Batchler and in their written statements about what they saw. A trustee discussing this information with another public township official was not manifestly outside the scope of her employment. Nor has it been shown that it was done with malice, in bad faith, or in a wanton or reckless manner.

As a result, the court finds that Bonnie Batchler is immune from liability in this case. However, for the sake of addressing all of the issues raised by the parties, the court will address the claims against her in the sections below.

(C) BREACH OF CONTRACT

Frances Kelly's first cause of action is for breach of contract. She alleges that Pierce Township could not terminate her contract without being required to pay her for the entire three-year term of the contract.

" 'A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.' "[114]

" 'Breach as applied to contracts is defined as a failure without legal excuse to perform

[114] *Hanna v. Groom* (Feb. 26, 2008), 10th Dist. No. 07AP-502, 2008-Ohio-765, ¶ 13, quoting *Kostelnik v. Helper,* 96 Ohio St.3d 1, 770 N.E.2d 58, 2002-Ohio-2985, at ¶ 16, reconsideration denied, 96 Ohio St.3d 1489, 774 N.E.2d 764, 2002-Ohio-4478.

any promise which forms a whole or part of a contract, including the refusal of a party to recognize the existence of the contract or the doing of something inconsistent with its existence.' "[115] " 'To prove a breach of contract, a plaintiff must establish the existence and terms of a contract, the plaintiff's performance of the contract, the defendant's breach of the contract, and damage or loss to the plaintiff.' "[116]

The general rule with regard to the discharge of attorneys is as follows: "A client has an absolute right to discharge an attorney or law firm at any time, with or without cause, subject to the obligation to compensate the attorney or firm for services rendered prior to the discharge."[117]

In the case of *City of Moraine v. Lewis*, 151 Ohio App.3d 526, 784 N.E.2d 774 (Ohio App. 2nd Dist., 2003), Lewis entered into a three-year agreement with the city of Moraine to serve as its law director.[118] The agreement included a clause which provided that the agreement was subject to termination by either party and that the city would be obligated to compensate Lewis for the term of the contract unless his termination was for just cause.[119]

The court first held that the city's firing of Lewis was not a breach of the contract. The court noted that "[t]here is nothing in the employment agreement stating that Lewis can be fired only for cause. Moraine's firing of Lewis is consistent with the general rule that a client has the right to discharge an attorney at any time."[120]

---

[115] Id. at ¶ 14, quoting *Natl. City Bank of Cleveland v. Erskine & Sons* (1953),158 Ohio St. 450, 110 N.E.2d 598, paragraph one of the syllabus.
[116] Id., quoting *Samadder v. DMF of Ohio, Inc.*, 154 Ohio App.3d 770, 798 N.E.2d 1141, 2003-Ohio-5340, at ¶ 27.
[117] *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry* (1994), 68 Ohio St.3d 570, 629 N.E.2d 431, paragraph one of the syllabus.
[118] *Moraine* at ¶ 4.
[119] Id. at ¶ 3.
[120] Id. at ¶ 18.

The *Moraine* court further held that the contract right to fees for services which Lewis could not perform after Moraine exercised its right to terminate his contract "is a right which is unenforceable in law, as a matter of public policy."[121] The court noted that the clause operated as a "form of windfall to Lewis for legal services he did not and cannot perform and for that reason the provision is one that the courts should not enforce."[122]

The *Moraine* court did note that it could foresee circumstances under which attorneys could be permitted to recover costs above and beyond legal services already rendered.[123] In discussing the Ohio Supreme Court's decision in *Columbus Bar Assn. v. Klos* (1998), 81 Ohio St.3d 486, 692 N.E.2d 565, 1998-Ohio-610, the *Moraine* court stated that "if an attorney forgoes other potential employment, particularly for a competitor of his or her client, based on his obligation to a client who later ends the attorney/client relationship prior to the end of their contractual employment agreement, he or she may be entitled to receive compensation if the agreement with the client allows it."[124]

Kelly argues that the Financial Hardship Re-Negotiation clause set forth above formalizes within the agreement the only means by which the contract could be terminated. This clause sets forth a procedure that would allow the parties to renegotiate the contract in the event of financial crisis in the township based on the understanding that the contract price would be unable to be paid by the township but it would still have an interest in retaining Kelly's services due to her familiarity with

[121] Id. at ¶ 32.
[122] Id.
[123] Id. at ¶ 33.
[124] Id.

ongoing cases. This clause does not deal with termination of the contract so much as it does the idea that it would be in the best interest of both parties to immediately enter into renegotiations instead of termination of the contract should the only issue be the township's inability to pay the current salary demanded by the contract.

The contract does not directly speak to the right of either party to terminate the contract and/or under what conditions the contract may be terminated. Under general contract principles, this could present a sustainable claim for breach of contract. However, this contract was one for legal services, which holds a special status in the law. As noted above, the general rule, based on legal and ethical considerations, is that a client may terminate an attorney's services at any time and, in the event of such a termination, the attorney is entitled to collect fees only for work already performed.

As noted in the *Moraine* case, if the contract stated that Kelly could only be terminated for cause, it is possible that there are situations in which she may have been entitled to collect the full amount of the contract. However, the contract between the parties in the present case does not discuss under what circumstances Kelly could be dismissed; the contract does not even state that Kelly could be dismissed for actual malfeasance or illegal activities. Under the plaintiff's theory, Kelly could have committed various legal or ethical infractions and the township would have had no right to terminate the contract unless it was willing to pay for years of legal services that were not actually performed. Quite simply, this is not the law in the state of Ohio.

Kelly argues that Pierce Township negotiated away its right to terminate her services. However, the contract does not speak to termination at all, only to renegotiation in the case of financial hardship. Since the contract does not address

termination, the general rule applies that the client may terminate the services of an attorney at any time with or without cause. There is no argument in the present case that Kelly was not paid for all legal services actually performed on behalf of Pierce Township. As a result, the defendant is entitled to summary judgment on Kelly's breach of contract claim.

(D) EXPECTATION OF PRIVACY

"The Supreme Court of Ohio has recognized an invasion of privacy claim involving 'the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.' "[125] " 'One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.' "[126]

" * * * [T]he Fourth Amendment provides government employees a reasonable expectation of privacy in their places of work."[127] " 'The workplace includes those areas and items that are related to work and are generally within the employer's control.' "[128] "However, public employees expectations of privacy in their offices and desks may be reduced 'by virtue of actual office practices and procedures, or by legitimate regulation'

[125] *Lathwell v. Lorain County Jobs for Ohio's Graduates* (May 10, 2000), 9th Dist. No. 99CA007303, 2000 WL 563331, *4, quoting *Housh v. Peth* (1956), 165 Ohio St. 35, 133 N.E.2d 340, paragraph two of the syllabus.
[126] Id., quoting *Sustin v. Fee* (1982), 69 Ohio St.2d 143, 145, 431 N.E.2d 992.
[127] *Coats v. Cuyahoga Metropolitan Housing Authority* (April 12, 2001), 8th Dist. No. 78012, 2001 WL 370649, *3, citing, *O'Connor v. Ortega* (1987), 480 U.S. 709, 107 S.Ct. 1492, 1496-1497, 94 L.Ed.2d 714.
[128] Id., quoting *Ortega*, 107 S.Ct. at 1496-1497.

and the 'employee's expectation of privacy must be assessed in the context of the employment relation.' "[129] "Thus, whether a public employee has a reasonable expectation of privacy is to be addressed on a case-by-case basis and what is reasonable 'depends on the context within which a search takes place.' "[130]

In the case of *Peitsmeyer v. Jackson Tp. Bd. of Trustees* (Aug. 14, 2003), 10th Dist. No. 02AP-1174, 2003-Ohio-4302, the plaintiff, an assistant fire chief, discovered that a fellow employee entered his locked office and discarded some of his personal belongings from a desk drawer and a locker.[131] The plaintiff brought several claims against the township, including one for invasion of privacy. The court discussed the case of *Lathwell v. Lorain County Jobs for Ohio's Graduates* (May 10, 2000), 9th Dist. No. 99CA007303, 2000 WL 563331, in which the plaintiff brought an invasion of privacy claim based upon entry into his office by fellow employees.[132] The *Lathwell* court concluded that the fact that the plaintiff knew other employees had a master key diminished his expectation of privacy and, therefore, the intrusion was not highly offensive to a reasonable person.[133]

The court in *Peitsmeyer* also noted that the plaintiff knew that several other employees held master keys that could open his office door and that the plaintiff himself had used a master key to enter the offices of other employees.[134] The court found that the plaintiff did not have a reasonable expectation of privacy in his office and the intrusion would not be highly offensive to a reasonable person.[135]

---

[129] Id., quoting *Ortega* at 1497.
[130] Id., quoting *Ortega* at 1498.
[131] *Peitsmeyer* at ¶ 3.
[132] Id. at ¶ 27.
[133] Id.
[134] Id. at ¶ 28.
[135] Id.

In the case at bar, Kelly and a BCI agent both had keys to Smith's office. This fact diminished Smith's reasonable expectation of privacy in his office by virtue of the fact that these two employees could access Smith's office at any time with their keys.

The officers looked through a gap in the blinds to see the activities in the office. Officers routinely peeked into Smith's office in this manner to see if he was meeting with anyone or was on the phone. The plaintiffs make much of the fact that there was frosted glass in the window but fail to note that there was strip of unfrosted-glass in the pane going around the border, as can be seen in the picture of the door.

The officers indicated to David Elmer that there was loud kissing noise that could be heard outside of the office on the date in question. Whether Smith and Kelly meant for such noises to be heard or not is irrelevant to the fact that they were engaging in behavior that led to noises being able to be heard by people outside the room.

Under the facts and circumstances of the case at bar, the court finds that Smith did not have a reasonable expectation of privacy in his office. Likewise, Kelly did not have a reasonable expectation of privacy in the office. However, for the sake of thoroughness, the court will examine each privacy claim individually below.

(E) WRONGFUL INTRUSION

"In order to establish a claim for invasion of privacy, appellant is required to show a wrongful intrusion into one's private activities in a manner that outrages or causes

mental suffering, shame, or humiliation to a person of ordinary sensibilities."[136] "The intrusion must be 'highly offensive' to a reasonable person."[137]

"* * * [T]he intrusion tort' is not dependent upon publicity of private matters but is akin to trespass in that involves intrusion or prying into the plaintiff's private affairs. Examples would be wiretapping [and] watching or photographing a person through windows of his residence[.]"[138]

" 'Wrongful' does not require that the intrusion itself be wrongful in the sense that there is no right to make any intrusion. Rather, 'wrongful' may relate to the manner of the making of the intrusion * * *.' "[139] "The intrusion must be of such a character as would shock the ordinary person to the point of emotional distress."[140] "Thus, the standard is similar to that applicable to claims of intentional infliction of emotional distress."[141]

As set forth above, the court has found that there was no reasonable expectation of privacy in Smith's office. Furthermore, under the facts of the present case, the intrusion of officers looking into the chief's office would not be highly offensive to a reasonable person nor was the intrusion of such a character as would shock the ordinary person to the point of emotional distress. The officers were not peering into the chief's bedroom in his home; they were looking into his office and heard noises through the door.

---

[136] *Peitsmeyer*, supra, at ¶ 26, citing *Browning v. Ohio State Hwy. Patrol,* 151 Ohio App.3d 798, 814, *2003 Ohio-1108,* citing *Sustin v. Fee* (1982), 69 Ohio St.2d 143, 145, 431 N.E.2d 992.
[137] Id.
[138] *Curry* at ¶ 58, quoting *Killilea* 167 *v. Sears, Roebuck & Co.*, 27 Ohio App.3d 163, 166, 499 N.E.2d 1291 (Ohio App. 10th Dist., 1985).
[139] *Roe ex rel. Roe v. Heap* (May 11, 2004), 10th Dist. No. 03AP-586, 2004-Ohio-2504, ¶ 82, quoting *Strutner v. Dispatch Printing Co.* (1982), 2 Ohio App.3d 377, 378-379, 442 N.E.2d 129.
[140] Id., citing *Haller v. Phillips*, 69 Ohio App.3d 574, 598, 591 N.E.2d 305 (Ohio App. 10th Dist., 1990).
[141] Id.

Additionally, the court finds no evidence or facts which would demonstrate that Bonnie Batchler committed the tort of wrongful intrusion. Batchler's action of telling the officers to provide written statements of what they observed in Smith's office in no way meets the requirements for the tort of wrongful intrusion.

(F) PUBLICITY THEORY

"To establish a claim of invasion of privacy under the publicity theory, a plaintiff must prove that (1) there was publicity; the disclosure must be of a public nature, not private; (2) the facts disclosed concerned an individual's private life, not his public life; (3) the matter publicized would be highly offensive and objectionable to a reasonable person of ordinary sensibilities; (4) the publication was made intentionally, not negligently; and (5) the matter publicized was not of legitimate concern to the public."[142] " 'Publicity' means communicating the matter to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge as opposed to 'publication' as that term of art is used in connection with liability for defamation as meaning any communication by the defendant to a third person.' "[143]

Public notification of the special meetings, which is required by law, does not meet the standard of invasion of privacy under the publicity theory. The notices indicated that topics such as Smith's retirement and "discipline/dismissal and any other matters to come before the board" would be discussed in the executive sessions. Smith

[142] *Curry v. Blanchester*, supra, at ¶ 59, citing *Killilea*, supra, at 166-167.
[143] Id., quoting *Killilea* at 166.

was a public employee and an at-will employee and the board of trustees had the right to enter into executive session to discuss issues regarding his employment. Notification to the public about the executive sessions and their general topic is required under the Sunshine Law. There was no publication of facts concerning the plaintiffs' private lives by Pierce Township and certainly no publication of any matter that would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.

(G) FALSE LIGHT

"Under a false light invasion of privacy theory, '[o]ne who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.' "[144] "To succeed under a false light theory, the information must be publicized, that is, 'communicated to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.'"[145]

For the same reasons discussed in the preceding section, the plaintiffs' action under the false light theory fails. There is no evidence that Pierce Township gave publicity to a matter that placed Smith or Kelly before the public in a false light. There was no communication of any personal matters by the township to the public at large or

[144] *Curry*, supra, at ¶ 60, quoting *Welling v. Weinfeld* (2007), 113 Ohio St.3d 464, 866 N.E.2d 1051, 2007-Ohio-2451 at ¶ 22-24.
[145] Id., quoting *Welling* at ¶¶ 52-53.

to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The fact that the officers were asked to provide written statements for the board for official purposes does not meet the standard of a false light claim.

Furthermore, as to Bonnie Batchler, the claim that she recounted what the officers told her to Karen Register, another Pierce Township official, does not meet the false light standard. An employee telling one fellow employee about an incident is not communicating the information to the public at large or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.

(H) DEFAMATION

"The elements of a defamation claim are (1) a false and defamatory statement, (2) about the plaintiff, (3) published without privilege to a third party, (4) with fault or at least negligence on the part of the defendant, and (5) that was either defamatory per se or caused special harm to the plaintiff."[146]

James Smith, as a police officer and chief of police, would have been a public figure during the relevant time period for the purposes of his claim for defamation.[147] "A public figure cannot recover for defamation unless the individual proves that the publication was made with actual malice."[148] "Actual malice exists when the publisher makes the statement with knowledge of the statement's falsity or with reckless disregard

[146] *Thomas v. Cohr, Inc.*, 197 Ohio App.3d 145, 966 N.E.2d 915, 2011-Ohio-5916, ¶ 24 (Ohio App. 1st Dist., 2011), citing *Davis v. Jacobs* (1998), 126 Ohio App.3d 580, 582, 710 N.E.2d 1185.
[147] *Young v. Gannett Satellite Information Network, Inc.*, 837 F.Supp.2d 758, 763 (S.D.Ohio,2011).
[148] Id., citing *New York Times Company v. Sullivan* (1964), 376 U.S. 254, 279–280, 84 S.Ct. 710, 11 L.Ed.2d 686.

of whether it was false or not."[149] "When presented with a summary judgment motion on a defamation claim brought by a public figure, courts 'shall consider the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff to determine whether a reasonable jury could find actual malice with convincing clarity.' "[150] " * * * [A] showing of actual malice may be premised on evidence 'demonstrating that the alleged defamer purposefully avoided or deliberately ignored facts establishing the falsity of its statements.' "[151]

The first issue is that there must have been a false and defamatory statement made by the defendants.

The second and third causes of action in the present case state that Bonnie Batchler published "certain defamatory statements to third parties concerning" the plaintiffs. The plaintiffs' memorandum states with regard to the defamation claim that there were "various falsities contained in the statements of officers Bachmann, Pennekamp and Schuler" and that Batchler "took those statements to be true and repeated them numerous times to various people."

The evidence before the court, taken in a light most favorable to the plaintiffs, demonstrates that Bonnie Batchler told the three officers to provide written statements about what they saw and that she gave those statements to Elizabeth Mason, the township's legal counsel. The issue of the continued employment of Smith and Kelly was at issue at the time and Batchler knew that the issue was going to be discussed in executive session. The court fails to see how these facts could lead to a cognizable claim of defamation against Batchler.

---

[149] Id.
[150] Id. at 766, citing *Jackson v. Columbus* (2008), 117 Ohio St.3d 328, 883 N.E.2d 1060, 1064.
[151] Id.

Batchler did tell Karen Register, Pierce Township's fiscal officer, what she had been told by the officers about improprieties between Smith and Kelly. However, there has been no showing that Batchler made these statements with actual malice, meaning that there has been no showing that Batchler made these statements to Register with knowledge of the statements' falsity or with reckless disregard of whether it was false or not. There is no evidence that Batchler purposefully avoided or deliberately ignored facts establishing the falsity of its statements. Nor was there any reckless disregard by Batchler as to whether the statements were false or not.

Furthermore, while plaintiffs state that they have pointed out "various falsities" in the officers' statements, what this situation was at its essence was the word of Smith and Kelly stating what they did versus the word of the officers stating what they saw. Bonnie Batchler spoke to David Elmer, who had met with both Smith and Kelly. She also spoke with Smith and the officers personally. The court is unclear exactly what the plaintiffs believe Batchler should have done further other than to believe their version of events instead of the version related by the officers. The plaintiffs argue over certain details that they claim destroy the credibility of the officers' statements. However, whether Kelly owns white underwear, for example, would still require Batchler and the other trustees to have taken Kelly at her word that she owns no such garment. The board would not have the power to issue a warrant for the search of Kelly's closet and dresser in her home to search for such a garment. Batchler believed the statements given by the officers and the only evidence contrary to those statements was the version of events as related by Kelly and Smith.

The officers saw Kelly and Smith kissing in the office and the plaintiffs have not denied this fact. Therefore, the officers clearly saw activity between the plaintiffs through the glass in the door. Their story was enough for Kelly to feel initially like there must have been a video camera in the room. Where the stories diverge is at the level of contact between the plaintiffs and there would be no evidence that could have been unearthed by an investigation that would determine which parties were telling the truth on that matter. Batchler had the right to believe the officers' version of the events and was not reckless as to any falsity of the officers' statements when she recounted them to the township's fiscal officer.

Frances Kelly was the law director for Pierce Township. "A limited purpose public figure is a person who becomes a public figure for a specific range of issues by being drawn into or voluntarily injecting himself into a specific public controversy * * * and/or by 'thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.'"[152] "A plaintiff does not become a limited-purpose public figure because the allegedly defamatory statements create a controversy; the controversy must have existed prior to the statements."[153] Kelly's letter of engagement with the township indicates that she was expected to serve as the legal representative of the township and its officials at various legal proceedings and to attend various township meetings as requested. However, there has been no demonstration that she is a public figure or even a limited-purpose public figure under the standard above. As such, the court shall consider her a private figure.

[152] *Curry* at ¶ 44, quoting *E. Canton Edn. Assn. v. McIntosh,* 85 Ohio St.3d 465, 482, 709 N.E.2d 468, 1999-Ohio-282.
[153] Id., citing *Fuchs v. Scripps Howard Broadcasting Co.*, 170 Ohio App.3d 679, 868 N.E.2d 1024, 2006-Ohio-5349, ¶ 11.

"When the plaintiff is a private figure, the required degree of fault is ordinary negligence."[154] "Specifically, the plaintiff must prove by clear and convincing evidence that the defendant 'failed to act reasonably in attempting to discover the truth or falsity or defamatory character of the publication.' "[155] For the same reasons discussed above with regard to Smith's defamation claim, Kelly has failed to demonstrate that Batchler failed to act reasonably in attempting to discover the truth or falsity or defamatory character of the officers' statements.

Even taking all evidence in a light most favorable to them, the plaintiffs have failed to set forth a claim of defamation that can survive summary judgment.

(I) FEDERAL CLAIMS

James Smith concedes in his memorandum that his claims regarding the right to be heard and procedural due process were litigated in Case Number 2011 CVH 1952 and, as such, cannot be litigated again in this case. As such, those claims will not be discussed by this court.

In *Russo v. City of Cleveland* (Jan. 6, 2000), 8th Dist. No. 75085, the court discussed the analysis that is required with respect to a Section 1983 claim:

> "Section 1983, Title 42 U.S.Code provides in pertinent part:
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Colombia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

[154] *Curry* at ¶ 45.
[155] Id., quoting *Lansdowne v. Beacon Journal Pub. Co.* (1987), 32 Ohio St.3d 176, 180, 512 N.E.2d 979.

> liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *.
>
> Section 1983 creates no substantive rights. *Baker v. McCollan* (1979), 443 U.S. 137. Rather 'Section 1983 provides a remedy for violations of substantive rights created by the United States Constitution and federal statute.' *Roe v. Franklin County* (1996), 109 Ohio App.3d 772, 778, 673 N.E.2d 172. In order to prevail on a claim under Section 1983, a plaintiff must establish: '(1) that the conduct in controversy was committed by a person acting under color of state law, and (2) that the conduct deprived plaintiff of a federal constitutional or statutory right.' Id., see, also, *1946 St. Clair Corp. v. Cleveland* (1990), 49 Ohio St.3d 33. To prove the 'color of state law' prong, it must be shown that 'the conduct complained of was taken pursuant to 'power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' ' *Roe, supra,* quoting *United States v. Classic* (1941), 313 U.S. 299, 326, 61 S.Ct. 1031, 1043.
>
> While local governments are 'persons subject to suit under Section 1983, municipal liability under 1983 cannot rest solely on the doctrine of *respondeat superior. Monell v. Dept. of Social Services City of New York.* (1978), 436 U.S. 658, 690. In order to find a local government liable under Section 1983, it must be shown that a policy or custom of the governmental entity was the driving force behind the constitutional violation. *Polk County v. Dodson* (1981), 454 U.S. 312, 326. A government policy exists when a person possessing final authority to establish municipal policy regarding the action in question issues a proclamation, rule, or edict. *Beck v. City of Pittsburgh* (C.A.3 1996), 89 F.3d 966, 971. A government custom exists when government employees engage in a practice, not expressly authorized, with such persistence that it can be said that the policy making officials were placed on actual or constructive notice of said practice, and failed with 'deliberate indifference' to correct the practice. *Bordanaro v. McLeod* (C.A.1 1989), 871 F .2d 1151, 1156, 1161." [156]

For reasons previously discussed in this decision, the plaintiffs have failed to set forth a viable claim for a violation of their right to privacy. Further, as the township had

[156] *Russo v. City of Cleveland* (Jan. 6, 2000), 8th Dist. No. 75085, 2000 WL 10212, *3-4.

the right to dismiss Kelly from her employment and she had no protected property interest in continued employment, she had no right to due process and no right to be heard.

The court finds that Pierce Township is entitled to judgment as a matter of law as to the plaintiffs' federal claims.

CONCLUSION

The defendants' motion to strike portions of the affidavits is granted in part and denied in part as set forth above.

The plaintiff Frances Kelly's partial motion for summary judgment is not well-taken and is hereby denied.

The defendant's motion for summary judgment in case number 2011 CVH 1952 is well-taken and is hereby granted.

The defendants' motion for summary judgment in case number 2012 CVH 1285 is well-taken and is hereby granted.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 11th day of September 2013 to all counsel of record and unrepresented parties.

_____
Administrative Assistant to Judge McBride