IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA
CIVIL DIVISION

KEITH A. BEINLICH,	:	**NO: CV-2014-12073**
	:	
Plaintiff,	:	
v.	:	
	:	
CONAGRA FOODS, INC.,	:	
	:	
Defendant.	:	

ORDER OF COURT

AND NOW, this 8th day of April, 2016, upon consideration of the Defendant's, ConAgra Foods, Inc.'s ("Defendant"),[1] Preliminary Objections and Response in Opposition to Plaintiff's Motion to Grant Default Judgment in Favor of Plaintiff and Quash Defendant's Preliminary Objections, and Plaintiff's, Keith A. Beinlich's ("Plaintiff"), Complaint, Motion to Grant Default Judgment in Favor of Plaintiff and Quash Defendant's Preliminary Objection, and Reply in support to the same, it is hereby **ORDERED**:

1. Defendant's preliminary objection, which is raised pursuant to Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure is **SUSTAINED**.
2. Defendant's preliminary objection, which is raised pursuant to Rules 1028(a)(2) and 1028(a)(3) of the Pennsylvania Rules of Civil Procedure is **SUSTAINED**.

[1] In filing suit, Plaintiff incorrectly identified Defendant as ConAgra Foods. This error is neither an issue in this Order nor has been throughout the pleadings thus far.

3. Defendant's preliminary objection, which is raised pursuant to Rule 1028(a)(2)[2] of the Pennsylvania Rules of Civil Procedure is **SUSTAINED**.
4. Defendant's preliminary objection, which is raised pursuant to Rule 1028(a)(1) of the Pennsylvania Rules of Civil Procedure is **OVERRULED**.
5. Plaintiff's Motion to Grant Default Judgment in Favor of Plaintiff is **DENIED**.
6. Plaintiff shall have twenty (20) days from the date of this Order to file an Amended Complaint.

STATEMENT OF REASONS

I. Factual and Procedural History

For nearly ten years, Plaintiff worked for Defendant at a bulk food transport center ("Martins Creek") located at 4888 South Delaware Drive, Martins Creek, Northampton County, Pennsylvania. Compl. ¶ 3, 12. At the Martins Creek facility, bulk unpackaged flour was blown into trailers before being sealed and transported for delivery. Id. at ¶ 6, 9. Plaintiff worked at Martins Creek full-time, and his duties included inspecting the safety and security of the incoming truck trailers. Id. at ¶ 9. On December 19, 2012, Plaintiff was given notice that his employment with Defendant was terminated effective December 20, 2012. Id. at ¶ 15. Plaintiff was informed that he was

[2] This concerns Defendant's preliminary objection to the "inclusion of scandalous or impertinent matter." See Pa.R.C.P. 1028(a)(2).

terminated because he "disobeyed a direct order given by [Bryan] Trinkley, his supervisor." Id. at ¶ 15. Trinkley's order directed Plaintiff to fill a truck trailer, and Plaintiff refused to do so. Id.

Plaintiff maintains that he refused to fill the trailer because after inspecting the trailer, he concluded that the trailer was not ready or clean enough to fill with flour. Id. Accordingly, Plaintiff asserts that ordering him to fill a substandard trailer violated "internal training materials for [Defendant's] workers," "accepted state and federal requirements after September 11, 2001," and "accepted employee health and safety standards." Id. at ¶¶ 15, 28.[3] Without averring specific dates or injuries, Plaintiff also asserts that Bryan Trinkley ("Trinkley") learned one week prior to Plaintiff's termination that Plaintiff "had gone to the Employee Assistance Program for help with the pain and stress caused by his numerous injuries." Id. at ¶¶ 8, 13.[4] [5]

Plaintiff filed his Complaint on December 19, 2014, alleging one count of wrongful termination from his at-will employment. Plaintiff asserted that although an at-will employee of Defendant's company, Plaintiff's termination

[3] Plaintiff also asserted that, on numerous occasions, he complained to his supervisors that the truck trailers were unfit to transport flour, but "usually nothing was done to correct the situation." Id. at ¶ 10.

[4] Plaintiff also avers that he suffered "repeated and numerous serious physical impairments from work-related injuries." Id. at ¶ 12. Plaintiff asserts that his injuries were caused by unsafe working conditions and that he voiced these concerns to his supervisors. Id. In 2003, Plaintiff claims Defendant attempted to terminate his employment after Plaintiff applied for "worker's compensation," but Plaintiff "was immediately reinstated." Id. at ¶ 12.

[5] In Plaintiff's Memorandum of Law in response to Defendant's preliminary objections, Plaintiff specifies that this incident occurred on December 12, 2012. Pl.'s Mem. Law 2.

violated the narrow public policy exception and thus, is actionable. Defendant filed preliminary objections on March 16, 2015. Defendant raised four preliminary objections: (1) a demurrer due to Plaintiff's failure to set forth a viable public policy to support his wrongful termination allegation; (2) insufficient specificity and failure to conform to law or rule of court; (3) inclusion of scandalous or impertinent matter; and (4) improper service.

On April 17, 2015, Plaintiff filed his Motion to Grant Default Judgment in Favor of Plaintiff and Quash Defendant's Preliminary Objections, with Prejudice. Defendant responded to the same on May 19, 2015. On February 16, 2016, Plaintiff filed his Reply and Memorandum of Law in support of the motion he filed on April 17, 2015.

This matter was placed on the February 23, 2016, Argument List and was submitted on brief.

II. Discussion

A court may properly grant preliminary objections when the pleadings are legally insufficient for one or more of several reasons enumerated in Rule 1028 of the Pennsylvania Rules of Civil Procedure. In ruling on preliminary objections, "we will consider as true all well-pleaded facts and inferences reasonably deducible therefrom, but not conclusions of law, argumentative allegations or opinions." Erie Cty. League of Women Voters v. Com., Dep't of Envtl. Res., 525 A.2d 1290, 1291 (Pa. Commw. 1987).

A. Preliminary Objections in the Nature of a Demurrer

Defendant's first preliminary objection is in the nature of a demurrer. This type of preliminary objection tests the legal sufficiency of the complaint. Pa.R.C.P. No. 1028(a)(4); see also Feingold v. Hendrzak, 15 A.3d 937, 941 (Pa. Super. 2011), citing Haun v. Community Health Systems, Inc., 14 A.3d 120, 123 (Pa. Super. 2011). A preliminary objection in the nature of a demurrer admits every well-pleaded fact and all inferences reasonably deducible therefrom. Creeger Brick & Bldg. Supply Inc. v. Mid-State Bank & Trust Co., 560 A.2d 151, 152 (Pa. Super. 1989). This type of preliminary objection is only proper when the law is clear that a plaintiff is not entitled to recovery based on the facts alleged in the complaint. Bargo v. Kuhns, 98 A.3d 686, 689 (Pa. Super. 2014) quoting Yocca v. Pittsburgh Steelers Sports, Inc., 854 A.2d 425, 436 (Pa. 2004). Before sustaining such a preliminary objection, "it must appear with certainty upon the facts pled that the law will not permit recovery." Curtis v. Cleland, 552 A.2d 316, 318 (Pa. Commw. 1988). Thus, if any doubt exists as to whether a demurrer should be sustained, the preliminary objection should be overruled. Joyce v. Erie Ins. Exch., 74 A.3d 157, 162 (Pa. Super. 2013) citing Feingold, 15 A.3d at 941.

Defendant contends that Plaintiff's common law wrongful termination claim fails as a matter of law because it does not set forth a viable public policy to support the claim. As a general rule, "there is no common law cause of action against an employer for termination of an at-will employment

relationship . . . discharge will not be reviewed."[6] Luteran v. Loral Fairchild Corp., 688 A.2d 211, 214 (Pa. Super. 1997). Accordingly, at-will employee can be discharged "for good reason, bad reason, or no reason at all." Krajsa v. Keypunch, Inc., 622 A.2d 355, 358 (Pa. Super. 1993).

The lone exception to the employment at-will doctrine is a narrow one: the discharge of an at-will employee is actionable where the discharge "violates clear mandates of public policy." Krajsa, 622 A.2d at 360; see also Hunger v. Grand Cent. Sanitation, 670 A.2d 173, 176 (Pa. Super. 1996). (The public policy exception is only recognized in "extremely limited circumstances."). The public policy exception is comprised of three categories: "'an employer (1) cannot require an employee to commit a crime, (2) cannot prevent an employee from complying with a statutorily imposed duty, and (3) cannot discharge an employee when specifically prohibited from doing so by statute.'" Hennessy v. Santiago, 708 A.2d 1269, 1273 (Pa. Super. 1998) quoting Shick v. Shirey, 691 A.2d 511, 513 (Pa. Super. 1997) rev'd, 552 Pa. 590, 716 A.2d 1231 (Pa. 1998).

Further, to justify the application of the public policy exception, "the employee must point to a clear public policy articulated in the constitution, statutes, regulations or judicial decisions directly applicable to the facts in the case; it is not sufficient that the employer's action toward the employee is

[6] Plaintiff does not challenge his at-will distinction and in fact avers that he is such in his Complaint, and thus, this Court does not consider whether Plaintiff was *more* than an at-will employee.

unfair." Davenport v. Reed, 785 A.2d 1058, 1063-64 (Pa. Commw. 2001). Still, "[e]ven when an important public policy is involved, the employer may still discharge the at-will employee, if the employer has a separate, plausible and legitimate reason for the discharge." Id.

In Hunger v. Grand Cent. Sanitation, the plaintiff-employee worked for a sanitation company and learned that hazardous materials were being deposited into garbage containers located on Shu-Deb Inc.'s ("Shu-Deb") property. 670 A.2d 173, 175 (Pa. Super. 1996). The plaintiff's company picked up garbage at Shu-Deb and disposed of the garbage at a dump site. Id. The plaintiff, aware that his company was not licensed to dispose of hazardous materials, believed that the disposal of such hazardous materials without licensure violated federal and state laws and reported this information to his employer and state and local police. Id. After making arrangements to search Shu-Deb's garbage containers, the plaintiff, accompanied by both state police and members of the federal Bureau of Alcohol, Tobacco, and Firearms, searched Shu-Deb's garbage containers and found that a garbage truck had already picked up Shu-Deb's garbage. Id. Police were able to locate the garbage truck, but no hazardous materials were found. Id. The plaintiff was discharged from his employment approximately three weeks later and as a result of the incident. Id.

The plaintiff appealed after his subsequent wrongful discharge suit was dismissed by the trial court for failure to fulfill the public policy exception to

the doctrine of at-will employment. Id. at 175. The plaintiff's public policy argument rested on the fact that it is illegal to transport hazardous materials without a license, but the Court reasoned that because the hazardous material was never discovered, the plaintiff's employer did not violate the law. Id. ("At most, one of the employer's customers allegedly was dumping illegal explosives"). The Court also stressed that the "firing must be specifically prohibited by statute," and that "a firing which resulted solely due to an employee's decision to report his employer's illegal activities is not actionable." Id. Conversely, the Court reasoned that had the plaintiff "observed a deliberate violation of the law, reported it to proper authorities, and was fired," the plaintiff's discharge would fall within the third category of the public policy exception—that an employer cannot discharge an employee when specifically prohibited from doing so by statute. Id.

Although the facts in Hunger are not synonymous to the facts in the present case, the underlying public policy arguments are similar. Here, Plaintiff believed that Trinkley's order—to fill the truck trailer with flour despite the condition of the trailer—would violate federal and/or state law. Similarly, the plaintiff in Hunger knew that disposal of hazardous waste without a license was illegal. In relevant part, the Hunger case stands for the proposition that discharge because an employee reports his employer's illegal activity is not actionable unless, for example, a statute specifically prohibits discharge under the particular facts. Plaintiff, like the plaintiff in Hunger, did

not point to a particular constitutional, statutory, or administrative provision or judicial decision to suggest that his dismissal from employment was specifically prohibited by statute or was in violation of one of the other two public policy exceptions.

Our current analysis is further hindered by Plaintiff's Complaint, which does not identify specific statutes and relies on vague references to a variety of laws. For example, Plaintiff's asserts that Trinkley's order "violated the food safety standards enunciated in [Defendant's] own internal training materials for its workers, which were in concert with accepted state and federal requirements after September 11, 2001. Compl. at ¶ 15. Earlier in his Complaint, Plaintiff references such laws, stating, "[a]fter September 11, 2011, federal, state and local law began the arduous task of trying to protect our food and water supplies." Id. at ¶ 5. Plaintiff also refers to the Governor of Pennsylvania's "Executive Order 2012-03," which "established the Governor's Office of Homeland Security to command and direct the private sector, in concert with 'federal, state, and local agencies, in a coordinated effort to prepare for, prevent, respond and recover from acts of terrorism.'" Id. Plaintiff's Complaint is laden with similar allegations with references to "federal and state law and policy," "mandated and accepted food safety and food defense standards," and the "PA WC Law." Id. at ¶¶ 25-29.

As a result, the basis of Plaintiff's public policy argument is unclear; Plaintiff simultaneously refers to his pending Workers' Compensation

application as well the legality of Trinkley's order. Even if Plaintiff means to address both bases, Plaintiff does not provide specific citations to any of the referenced laws. We address this issue in more detail in our discussion of Defendant's second preliminary objection below. However, without more direction from Plaintiff, this Court is unable to decipher which of the many statutes referenced are dispositive to Plaintiff's public policy argument and therefore, must sustain Defendant's demurrer. Accordingly, if Plaintiff chooses to file an amended complaint, details such as citations to specific statutory provisions, for example, should be provided.

B. Insufficient Specificity/Failure to Conform to Law or Rule of Court

Defendant's second preliminary objection asserts that Plaintiff's Complaint lacks sufficient specificity pursuant to Rule 1028(a)(3) and fails to conform to law or rule of court pursuant to Rule 1028(a)(2). See Pa.R.C.P. No. 1028(a)(2)-(3). Defendant's second preliminary objection also moves to strike certain averments, but we address that issue in our analysis of Defendant's third preliminary objection, which pertains to scandalous and impertinent matters.

The pertinent question under Rule 1028(a)(3) is "'whether the complaint is sufficiently clear to enable the defendant to prepare his defense," or "whether the plaintiff's complaint informs the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense.'" Rambo v.

Greene, 906 A.2d 1232, 1236 (Pa. Super. 2006) quoting Ammlung v. City of Chester, 302 A.2d 491, 498 n. 36 (Pa. Super. 1973). In determining whether a complaint is pled with sufficient specificity,

> [I]t is not enough to focus upon one portion of the complaint. Rather, in determining whether a particular paragraph in a complaint has been stated with the necessary specificity, such paragraph must be read in context with all other allegations in that complaint. Only then can the court determine whether the defendant has been put upon adequate notice of the claim against which he must defend.

Yacoub v. Lehigh Valley Med. Associates, P.C., 805 A.2d 579, 589 (Pa. Super. 2002); see also Smith v. Wagner, 588 A.2d 1308, 1310 (Pa. Super. 1991) ("when one wades through the sea of information contained in [the] complaint, it is possible to find concealed therein a legally cognizable cause of action").

Under Rule 1028(a)(2), Plaintiff must follow Rule 1019(a), which requires that "material facts on which a cause of action or defense is based shall be stated in a concise and summary form." Pa.R.C.P. No. 1019(a). The purpose of Rule 1019(a) is "to require the pleader to disclose the 'material facts' sufficient to enable the adverse party to prepare his case." Landau v. W. Pennsylvania Nat. Bank, 282 A.2d 335, 339 (Pa. 1971). Further, these rules

> [E]nable parties to ascertain, by utilizing their own professional discretion, the claims and defenses that are asserted in the case. This purpose would be thwarted if courts, rather than the parties, were burdened with the responsibility of deciphering the cause of action from a pleading of facts which obscurely support the claim in question.

Krajsa, 622 A.2d at 357. Therefore, a complaint "must do more than 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" Baker v. Rangos, 324 A.2d 498, 505 (Pa. Super. 1974) quoting Conley v. Gibson, 355 U.S. 41, 47 (1957).

Here, as we discussed above, Plaintiff failed to state with sufficient specificity his public policy argument. Plaintiff fails to cite to specific legislation or judicial decisions, for example, and without such averments, Defendant is without sufficient information to prepare its defense. Instead, Plaintiff makes blanket allegations, referencing a variety of legislation, including "federal and state law and policy," "mandated and accepted food safety and food defense standards," and the "PA WC Law." Compl. ¶¶ 25-29.

Additionally, as discussed by Defendant in its preliminary objections, although Plaintiff's Complaint seemingly contains one cause of action—wrongful discharge—Plaintiff's Complaint is divided into sections using the following titles: "Count 1: Facts," "Count II. Jurisdiction," "Count III: Remedies Requested." See Compl. 2, 9, 12; Defs.' Prelim. Objections ¶ 17. Each of these sections address similar facts, but as stated above, Plaintiff refers to a variety of federal and state laws, and the organization of the Complaint creates additional confusion as to which claim or claims are alleged. For example, within "Count 1," Plaintiff avers that Defendant violated "food safety standards," Defendant's "own internal training materials," and "accepted state and federal requirements after September 11,

2001." Compl. ¶ 15. However, in "Count II," Plaintiff, for the first time in the Complaint, alleges that Defendant's discharge of Plaintiff constituted "deliberate and wanton violation of the PA WC Law." Id. at ¶ 29.

Thus, we sustain Defendant's second preliminary objection.

C. Scandalous and Impertinent Matters

In its third preliminary objection, Defendant asserts that Plaintiff's Complaint is "rife" with "scandalous and impertinent" allegations, a violation of Rule 1028(a)(2), and such allegations should be stricken from the Complaint. See Pa.R.C.P. No. 1028(a)(2); Defs.' Prelim. Objections ¶ 20. "To be scandalous and impertinent, a complaint's allegations must be immaterial and inappropriate to the proof of the cause of action." Com., Dep't of Envtl. Res. v. Peggs Run Coal Co., 423 A.2d 765, 769 (Pa. Commw. 1980). Furthermore, it is a long-held practice that scandalous and impertinent matters may be stricken from a complaint. See Adams v. Adams, 74 Pa. Super. 502, 504 (1920) (In addressing scandalous and impertinent matters: "the court will only order the parts that offend to be stricken from the record"). However, a court's right to strike impertinent matter "should be sparingly exercised and only when a party can affirmatively show prejudice." Thierry v. Matson, No. C-48-CV-2013-10535, 2014 WL 11152807, at *7 (Pa. Com. Pl. Feb. 11, 2014) quoting Commonwealth Dep't of Envtl. Res. v. Hartford Accident and Indem. Co., 396 A.2d 885, 888 (Pa.1979) (A Northampton County opinion where our Court struck from the complaint

allegations regarding the prior criminal activity of the defendant and his subcontractors).

In Common Cause/Pennsylvania v. Commonwealth, citizen groups brought an action that challenged the constitutionality of the procedures followed in enacting new legislation. 710 A.2d 108, 111 (Pa. Commw. 1998) aff'd, 757 A.2d 367 (Pa. 2000). The complaint contained an introductory section, which provided an "editorialized history of lawmaking in Pennsylvania." Id. at 115. Finding that the introductory section "cast a derogatory light on the legislative and executive breach leadership," our Commonwealth Court struck the entire introductory section, holding that "[s]uch scandalous statements have no place in a pleading." Id. at 115.

Plaintiff's thirteen page Complaint appears to contain one cause of action—wrongful discharge—however, the Complaint contains many allegations that provide little, if no, relevance to the claim. Still, we recognize that our right to strike portions of Plaintiff's Complaint must be exercised with caution, and we must only strike those allegations that are not only immaterial but inappropriate and/or prejudicial. Defendant objects to and moves to strike the following sentences and/or phrases from Plaintiff's Complaint:

> 1. Characterizes Defendant as having "its tentacles ultimately reaching into **'99%' of our homes**." Compl. ¶ 3.
>
> 2. Plaintiff's editorialized history of the federal and state governments' efforts to prepare for, prevent, respond to, and

recover from acts of terrorism following September 11, 2001. Id. at ¶¶ 5, 15.

3. Plaintiff's reference to the movie The Interview by SONY to depict an example of the governments' attempt "to protect our food and water supplies, as well as every conceivable aspect of our lives, from terrorist attacks." Id. at ¶ 5.

4. Plaintiff's reference to an incident at one of Defendant's facilities located in Missouri where "the Food and Drug Administration issued Warning Letter (CMS #420367) which found that the sunflower seed manufacturing plant in Missouri and found numerous instances of non-compliant behavior, adulterated and 'insanitary conditions,' and contamination by Listeria and filth—in spite of Con Agra's [sic] vigorous and hefty efforts to clean the processing plant when they knew thay [sic] were to be inspected." Id. at ¶ 7.

5. Allegations regarding incidents where Defendant's trailers were stolen from the Martins Creek facility. Id. at ¶¶ 11, 19.

6. References to ConAgra, Inc. v. Turner, 776 So. 2d 792 (Ala. 2000), an Alabama case that was decided using Alabama state law. Id. at ¶¶ 14, 22.

7. Plaintiff's references to "real threats from unknown and incomprehensible extremists" and "every food watchdog group." Id. at ¶ 16.

8. Plaintiff's allegation that "[t]he failure hazarded the health and well-being of millions of Americans as well as people of other nationalities based upon what was a completely reasonable fear of deliberate and malicious acts of terrorism. Id. at ¶ 27.

9. The citation to "CDC's Vitalsigns, "Making Food Safer to Eat from the Farm to the Table" and claim that "About1 [sic] in 6 (or 48 million) [sic] people gets sick each year from contaminated food." Id. at ¶ 27.

10. Plaintiff's reference to "other eligible and hard working [sic] ConAgra workers" who "were also denied PA UC benefits by ConAgra." Id. at ¶ 30.

> 11. Plaintiff's reference to Defendant as a "mammoth employer, whose products find their way into, according to ConAgra's own website, '99% of America's homes . . . ensuring your trust with every meal.'" Id. at ¶ 33.

Plaintiff's case is based on his termination from employment, but as discussed above, the bases for his public policy argument is unclear and will remain unclear until Plaintiff amends his Complaint. However, it appears that Plaintiff attempts to argue that his termination was either prohibited by law or the result of Plaintiff exercising a statutory duty. Hence, we find that the above-cited allegations from Plaintiff's Complaint are wholly immaterial to Plaintiff's claim of wrongful discharge and are inappropriate and even prejudicial to Defendant. We discuss each of the challenged averments below.

For example, Plaintiff's repeated references to terrorism and the threat of terrorist attacks have no place in Plaintiff's Complaint for wrongful discharge, and further, repetitive references to a national concern as serious as terrorism merely serves to incite prejudice against Defendant.[7] For a similar reason, Plaintiff's recurrent references to September 11, 2001, the changes that ensued afterward, such as new federal and state laws, and The Interview must be stricken. Similar to Common Cause, where the Court struck an entire introductory section that editorialized Pennsylvania

[7] Plaintiff's Complaint seems to suggest that Plaintiff's termination is connected to an increased risk of terrorism. See Compl. ¶ 17 ("While Beinlich took his job at ConAgra very seriously and sought to ensure his compliance with its mandates, Trinkley and Kapusta[, manager of the Martins Creek facility,] appeared to be interested only in production numbers and measured each component by the financial impact of delaying trailers or orders").

lawmaking, Plaintiff's Complaint summarizes the creation of new federal and state legislation. Even if Plaintiff's public policy argument is premised on a federal or state law, a history as to how these provisions became law is immaterial to Plaintiff's argument. As the Court in Common Cause reasoned, these types of "scandalous statements have no place in a pleading."

Further, Plaintiff's references to a Missouri Warning Letter and to "other eligible and hard working ConAgra employees" who "were also denied PA UC benefits by ConAgra" are irrelevant to Plaintiff's wrongful discharge claim and are highly prejudicial to Defendant. That is, reference to Defendant's alleged past violations, regarding Workers' Compensation benefits and the Food and Drug Administration, merely incite prejudice against Defendant and offer no materiality to Plaintiff's claims. Similarly, Plaintiff's refers to the stolen truck trailers in a derogatory manner, claiming that because truck trailers were stolen, "Trinkley and Kapustka [sic] had fewer to load and deliver. Apparently even a contaminated one was not worth cleaning properly." Compl. ¶ 19. Likewise, and for the same reasons, Plaintiff's references to the stolen truck trailers must also be stricken.

Moreover, we consider Plaintiff's use of the Turner case. Plaintiff provides the following analysis of Turner:

> The supervisor testified that Turner's job required "extremely hard physical labor," that ConAgra has "a hard time finding people who can work in our elevator situation." And then concluded, "We're hard on people." As at Martin's Creek, ConAgra did not do anything to improve the working conditions; it fired those who got hurt and fought providing them with benefits. The Court affirmed

the award of punitive damages in the amount of $250,000. Although a reference to an out-of-state case like Turner could arguably be useful if used to present a legal argument, Plaintiff's references to the Turner case are inappropriate and immaterial to Plaintiff's case. For example, after quoting the Turner case, Plaintiff's counsel does not present a legal analysis, but instead, argues that like the supervisor's actions in Turner, Defendant "did not do anything to improve the working conditions; it fired those who got hurt and fought providing them with benefits." These averments are immaterial to Plaintiff's individual wrongful discharge claim and merely serve as inappropriate commentary. They do not further Plaintiff's legal argument and are prejudicial to Defendant.

Lastly, Plaintiff's use of the statistic that approximately one in every six people gets sick each year as a result of contaminated foods must also be stricken. Much like Plaintiff's use of terrorism, Plaintiff's use of this statistic is not only immaterial but contains a negative connotation, prejudicing Defendant.[8]

[8] Plaintiff's averment seems to suggest that Defendant is insensitive to food safety, an allegation that is immaterial to Plaintiff's claim and tends to degrade Defendant. This particular statistic was cited just after Plaintiff averred the following:

> [T]hose rules [referring to 'accepted food safety and food defense standards'] are grounded in a set of clear and present dangers recognized but ignored by ConAgra. The failure hazarded the health and well-being of millions of Americans as well as people of other nationalities based upon what was a completely reasonable fear of deliberate and malicious acts of terrorism.

Compl. ¶ 27.

In sum, we strike all of the portions of Plaintiff's Complaint that are raised in Defendant's preliminary objection. We recognize that we must sparingly exercise our right to strike portions of the pleadings, but Plaintiff's Complaint plainly contains many allegations that are immaterial to his claim, inappropriate for a Complaint, and prejudicial to Defendant.

D. Improper Service

Defendant's final preliminary objection argues that Defendant improperly served the Complaint. Rule 424 sets forth the rules concerning service of process upon a corporation, such as Defendant. Pa.R.C.P. No. 424. Proper service requires "handing a copy" of the Complaint to:

> (1) an executive officer, partner or trustee of the corporation or similar entity, or
> (2) the manager, clerk or other person for the time being in charge of any regular place of business or activity of the corporation or similar entity, or
> (3) an agent authorized by the corporation or similar entity in writing to receive service of process for it.

Id. When the Complaint is served by mail, the rules are more restrictive. Service by mail requires that "a copy of the process shall be mailed to the defendant by any form of mail requiring a receipt signed by the defendant or his authorized agent." Pa.R.C.P. No. 403, 404(2).

Plaintiff maintains that he served the Complaint in two different manners. First, the Complaint was hand-delivered to Travis Kapusta ("Kapusta"), who was manager of the Martins Creek facility at the time of Plaintiff's termination. Plaintiff filed a Certificate of Service on January 16,

2015, certifying the above information. However, Defendant asserts that beginning May 29, 2014, the Martins Creek facility, including Kapusta, became part of a different, independent company called Ardent Mills. Resp. Opp'n Pl.'s Mot. 5. Accordingly, Defendant argues that even if Kapusta could have accepted service while employed with Defendant, by the time the Complaint was filed on December 19, 2014, Kapusta was no longer one of Defendant's employees and could not accept service. We agree based on the plain language of Rule 424.

Second, Plaintiff presents documentation, in the form of an email from FedEx.com, that on December 22, 2014, Plaintiff mailed the Complaint to Defendant using FedEx Standard Overnight shipping.[9] See Mot. Grant Default J., Ex II. Plaintiff addressed the Complaint to "Gary Rodkin, CEO" ("Rodkin"), Defendant's then-chief executive officer ("CEO"), at Defendant's Omaha, Nebraska office. Id. Plaintiff's documentation shows that the Complaint was delivered to the Omaha office on December 23, 2014, and was signed by "C.MADDOUX." Id.

However, Defendant asserts that service is improper because the Complaint was never delivered to or signed for by Rodkin. See Resp. Opp'n Pl.'s Mot. 5. Defendant also argues improper services because "C.MADDOUX" is Cathy Maddox ("Maddox"), one of Defendant's employees

[9] Defendant's preliminary objections assert that it "has no record of receiving a copy of Plaintiff's Complaint by mail or having signed a return receipt." Defs.' Prelim. Objections. 10. However, one day after Defendant filed its preliminary objections, Plaintiff filed his response, which contains the email from Fedex.com. See Mot. Grant Default J., Ex II.

who works in the mailroom at the Omaha office, and Maddox is not an agent authorized to accept service on behalf of Defendant. Id. Defendant states, "[t]o the extent [Maddox] was handed a copy of the summons in this matter, such service would not constitute proper service." Id. at 6.

Despite Defendant's contentions, we find service proper. According to Plaintiff's shipping documentation, the Complaint was shipped from "Kamber Law Group – Frayda," was to be delivered on a "[w]eekday," and was specifically addressed to Rodkin. Further, FedEx Standard Overnight shipping requires a signature to complete shipment, as evidenced by Maddox's signature. Practically, Plaintiff did all that he could to comply with the requirements of Rule 403, and we reject Defendant's argument. For example, Defendant minimizes Maddox's role, representing that "[Maddox] was handed a copy of the summons in this matter." However, Maddox did more than simply accept a piece of mail; she signed for an overnight package that was addressed to Defendant's CEO and sent from a law office. Moreover, the Complaint arrived on December 23, 2014, and Defendant admits that it became aware of the present lawsuit in "late December 2014." Id. at 2. Thus, we overrule Defendant's final preliminary objection.

E. Default Judgment

In Plaintiff's reply to Defendant's preliminary objections, he also moved for default judgment ("Plaintiff's Motion"). Plaintiff's Motion is based on Defendant's failure to file an answer to Plaintiff's Complaint, to respond to the

Complaint in a timely manner, and to attach a "Notice to Plead" document to its preliminary objections. Defendant provides seven separate arguments as to why Plaintiff's Motion must be denied based on procedural and substantive grounds: (1) improper service of the Complaint; (2) Defendant had no obligation to file a responsive pleading because Plaintiff failed to attach a "Notice to Plead" document to the Complaint; (3) default judgment cannot be entered because Defendant filed a preliminary objections; (4) Plaintiff failed to file a praecipe for entry of judgment by default with the prothonotary; (5) Plaintiff failed to provide Defendant with any notice of intention to enter a judgment by default; (6) Defendant was not obligated to attach a "Notice to Plead" to its preliminary objections; and (7) Defendant was not obligated to file an answer because it filed preliminary objections. See Resp. Opp'n Pl.'s Mot. 4.

In regard to Defendant's first argument, we rely on our above analysis and find that service was proper and begin our analysis with Defendant's second argument. See infra Part II.D. In Defendant's second argument, Defendant argues that, as a practical matter, it had no obligation to file a responsive pleading to the Complaint because Plaintiff failed to attach a notice to defendant to the Complaint. Rule 1018.1 requires that "[e]very complaint filed by a plaintiff . . . shall begin with a notice to defend." Pa.R.C.P. No. 1018.1. The Rules also set forth the time allotted for responsive pleadings, but clarify that "no pleading need be filed unless the preceding pleading

contains a notice to defend or is endorsed with a notice to plead." Pa.R.C.P. No. 1026. Our Superior Court supports a strict reading of Rule 1026. In Gerber v. Emes, the Court reversed the lower court's entry of default judgment because the plaintiff's complaint did not include a notice to defend as required by Rule 1026. 511 A.2d 193, 195 (Pa. Super. 1986). The Gerber Court reasoned that the failure to attach the notice to defend to the complaint created a "facially defective" pleading, and the defendant had no obligation to file a responsive pleading. Id. at 198. Here, Plaintiff failed to attach a notice to defend to the Complaint, and for this reason alone, default judgment is improper.

We move to Defendant's fourth and fifth grounds for dismissal of Plaintiff's Motion. Rule 237.1 provides that default judgment cannot be entered "unless the praecipe for entry includes a certification that a written notice of intention to file the praecipe was mailed or delivered." Pa.R.C.P. No. 237.1(a)(2). Rule 237.1 also requires that "[a] copy of the notice shall be attached to the praecipe," and "[t]he notice and certification required by this rule may not be waived." Id. at (3)-(4). Further, Rule 1037 requires that the prothonotary "on praecipe of the plaintiff, shall enter judgment against the defendant for failure to file within the required time a pleading to a complaint which contains a notice to defend." Pa.R.C.P. No. 1037.

Plaintiff filed neither the requisite written notice required under Rule 237.1, nor the praecipe and notice to defend as required by Rule 1037.

Instead, Plaintiff argues that "[a]s a factual matter, Defendant was on notice of Plaintiff's intent to file a default judgment twice: on February 17, 2015, in counsel's verbal conversation, and then against on April 17, 2015, when the default judgment was filed."[10] Mem. Law 18. Further, Plaintiff argues that this Court should construe Rule 237.1 liberally and "'overlook'" the procedural defect. Id. at 21. However, Rule 237.1 is clear, and granting default judgment is powerful action, having the practical effect of ending Defendant's ability to defend itself. Additionally, the language in Rule 237.1 does not support a relaxed notice requirement; the rule specifically requires that the notice must be attached to the praecipe for default judgment and precludes waiver of the notice requirement. This Court accepts the plain meaning of Rule 237.1 and will not allow Plaintiff to bypass Rule 237.1's strict procedural requirements. Rule 237.1 clearly requires notice to be in writing, making Plaintiff's "verbal notice of the default" insufficient to satisfy the requirements of Rule 237.1. Mem. Law 21. Because Plaintiff failed to provide written notice, file a praecipe, or attach the notice to defend to the Complaint, we again find default judgment improper.

Although we find that we must deny Plaintiff's Motion for its failure to conform with the procedural requirements listed above, we also consider together Defendant's third and seventh arguments. As stated above, these

[10] Defendant also denies that Plaintiff gave oral notice. See Resp. Opp'n Pl.'s Mot. 8. However, whether Plaintiff gave Defendant verbal notice is not dispositive as our analysis holds that verbal notice is insufficient.

arguments assert that default judgment is improper because Defendant filed preliminary objections and that Defendant need not file an answer while his preliminary objections remain pending. We specifically address these arguments because Plaintiff's Motion is rooted in Plaintiff's contention that Defendant failed to file an answer and that Defendant's preliminary objections were untimely.[11]

The law is clear: "[o]nce a responsive pleading is filed, even if untimely, a default judgment cannot thereafter be entered because the responding party is no longer in default." State Farm Ins. Co. v. Barton, 905 A.2d 993, 995 (Pa. Super. 2006). Further, preliminary objections constitute a pleading under the above-stated rule. Id.; see Pa.R.C.P. No. 1017(a)(4). In addition, "until the preliminary objections have been resolved in some manner, the defendant is not obligated to file an answer." Advance Bldg. Servs. Co. v. F & M Schaefer Brewing Co., 384 A.2d 931, 932 (Pa. Super. 1977).

Defendant filed preliminary objections on March 16, 2015, more than twenty days after the filing of the Complaint on December 19, 2014. However, in Barton, our Superior Court explicitly held that default judgment

[11] Plaintiff's Motion asserts many unsubstantiated claims. As the case law and Pennsylvania Rules of Civil Procedure support, for example, Defendant was not obligated to file an answer, and Plaintiff was not entitled to an entry of default judgment for a plethora of reasons. However, Plaintiff's counsel unfairly characterized Defendant and its actions as: "cavalier and careless," having a "fundamental, underlying contemptuous attitude towards judicial procedure and all the hard-working people who try to obey the law, fulfill their workday requirements, and, like Keith Beinlich, perform their jobs as well as they can," "[r]outinely flouting governmental regulation and obvious food safety measures," and the like. Mot. Grant Default J. 2-3.

cannot be entered even when an untimely responsive pleading is filed. Defendant's preliminary objections are pleadings, and accordingly, Defendant's preliminary objections, although untimely, save Defendant from the entry of default judgment. Moreover, as we have already stated, no responsive pleading is required "unless the preceding pleading contains a notice to defend or is endorsed with a notice to plead." Pa.R.C.P. No. 1026(a). Thus, in addition to the aforementioned reasoning, Defendant was not obligated to response to Plaintiff's Complaint in the first place, making the timeliness of Defendant's preliminary objections even less dispositive. Accordingly, and for a multitude of reasons, we deny Plaintiff's Motion.

Finally, we address Defendant's sixth argument: that it was not required to attach a notice to plead to its preliminary objections. The Rules are clear that a notice to plead is not required in all preliminary objections. See Pa.R.C.P. No. 1018.1 (Explanatory Comment—1979). According to the official explanatory note in Rule 1028(c)(2),

> Preliminary objections raising an issue under subdivision (a)(1), (5), (6), (7) or (8) cannot be determined from facts of record. In such a case, the preliminary objections must be endorsed with a notice to plead or no response will be required under Rule 1029(d) . . . However, preliminary objections raising an issue under subdivision (a)(2), (3) or (4) may be determined from facts of record so that further evidence is not required.

Pa.R.C.P. No. 1028(c)(2). Absent a notice to plead where one is required, "no response is required and all of the averments in the preliminary objections

are deemed denied." Cooper v. Church of St. Benedict, 954 A.2d 1216, 1221 (Pa. Super. 2008).

Defendant raises preliminary objections under Rule 1028(a)(1), (2), (3), and (4). Pursuant to the explanatory note in Rule 1028(c)(2), three of Defendant's preliminary objections—those brought under Rule 1028(a)(2), (3), and (4)—do not require a notice to plead. However, and as Defendant concedes, Rule 1028(c)(2) provides that Defendant's preliminary objection to improper service, pursuant to Rule 1028(1)(4), required a notice to plead. In its preliminary objections, Defendant claimed that it did not provide a notice to plead because it expected Plaintiff to present additional documentation regarding the service of the Complaint. In fact, one day after Defendant filed its preliminary objections, Plaintiff did submit additional documentation, and this Court used that documentation to support our above analysis.

Therefore, the practical effect of Defendant's failure to attach a notice to plead to its preliminary objection is that Plaintiff had no duty to respond, and by operation of the Pennsylvania Rules of Civil Procedure, Plaintiff denied any and all averments raised in the preliminary objection. Still, this Court must "determine promptly all preliminary objections," and the absence of the notice plead does not require denial of Defendant preliminary objection. Accordingly, our earlier analysis regarding improper service remains unchanged, and Plaintiff's assertion that the failure to attach a notice to plead

support entry of default judgment is without merit.

BY THE COURT:

/s/ Samuel P. Murray
SAMUEL P. MURRAY, J.