UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0726

September Term, 2013

GREGORY PANESSA

v.

THE JOHNS HOPKINS UNIVERSITY
APPLIED PHYSICS LABORATORY, LLC

Eyler, Deborah S.,
Nazarian,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: June 10, 2015

On February 1, 2013, Gregory Panessa ("Panessa") filed a one-count amended complaint (hereafter "the complaint") in the Circuit Court for Howard County alleging that he was the victim of an abusive discharge by The Johns Hopkins University Applied Physics Laboratory, LLC, ("APL"). APL, a government contractor located in Columbia, Maryland, filed a motion to dismiss the complaint for failure to state a viable claim. Following a hearing on May 24, 2013, the circuit court granted APL's motion and dismissed the complaint. In his timely filed appeal, Panessa raises two questions for our consideration, *viz*.:

> 1. Did the Circuit Court properly rule that Panessa did not articulate a mandate of Maryland Public policy sufficient to form the basis for a claim of abusive discharge?
> 2. Did the Circuit Court properly rule that Panessa had to make an external report to succeed in a claim for abusive discharge as a whistleblower?

We shall affirm the ruling of the circuit court dismissing Panessa's complaint because Panessa failed to identify a clear mandate of Maryland public policy that was violated by APL. Identification of such a clear mandate is a required element of a wrongful discharge claim. Having concluded that Panessa's complaint was deficient in that regard, we shall not address the second issue raised in Panessa's appeal.[1]

[1] Although the trial court dismissed Panessa's complaint, both because Panessa failed to allege that he reported APL's misconduct to any external authority and because he failed to show a sufficiently narrow mandate of public policy that was violated by his discharge from employment, we shall affirm the circuit court's decision solely on the basis of the public policy argument. As the Court of appeals said in *Parks v. Alpharma, Inc.,* 421 Md. 59, 65 (2011), it is the prerogative of appellate courts to affirm the dismissal of a claim on any ground adequately shown by the record.

I. BACKGROUND FACTS[2]

APL performs large-scale engineering, research, and development projects on communications, weapons, and defense systems for the federal government. Among APL's numerous federal contracts are contracts involving projects directly relating to homeland security. For example, APL's Aegis Modernization program provides Naval cruisers and destroyers with enhanced war fighting capabilities. APL also provides the National Security Agency located in Fort Meade, Maryland, with independent, objective technical advice; and APL works with the Air Force Space and Missile Systems Center to maintain the supremacy and security of U.S. space operations.

The highly sensitive nature of APL's work on federal government contracts subjects APL facilities and systems to numerous federal laws, regulations, and executive orders regarding handling of classified information.

Panessa was employed by APL as a Systems Administrator in the Space Department from December 2005 to September 15, 2011. His duties included monitoring and supporting the administration of computer servers, workstations, and classified network equipment. While he was employed by APL, it was important that only authorized persons could login to certain computers because the computers held highly classified information.

[2]The facts in Part I are based exclusively on allegations that are set forth in appellant's complaint.

In 2010, Panessa began notifying his supervisors that certain computers in the facility were not properly capturing login information and in May of 2011, Panessa discussed with one of his supervisors the failure of another supervisor to ensure that a computer that had been relocated and reconfigured had been inspected by APL's Security Services Group as required by APL policies. Panessa also informed his supervisors that APL employees were not properly securing rooms and computers containing classified information.

On July 8, 2011, Panessa was reprimanded by APL for failing to capture twenty false login attempts on a Windows computer. Approximately ten weeks later, Panessa was terminated because, according to APL, he had falsified an audit log by indicating that he had inspected a computer that had been reconfigured by his supervisor. This misstatement in the audit log, according to APL, falsely indicated that the computer was working properly.

Panessa asserted in his complaint that the actual reason he was terminated was because he had reported multiple security concerns and failures by agents of APL to his supervisors, According to Panessa, his firing was wrongful because it violated a clear mandate of Maryland public policy. That mandate was to protect the security, and limit the dissemination of classified information, related to issues of homeland security.

II. ANALYSIS

> On appeal from a dismissal for failure to state a claim, we must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them, and order dismissal only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff, *i.e.*, the allegations do not state a cause of action for which relief

> may be granted. We must confine our review ... to the four corners of the complaint and its incorporated supporting exhibits, if any. The well-pleaded facts setting forth the cause of action must be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice. Our goal, in reviewing the trial court's grant of dismissal, is to determine whether the court was legally correct.

Parks v. Alpharma, Inc., 421 Md. 59, 72 (2011) (internal citations and quotation marks omitted).

In the circuit court, Panessa's counsel admitted that his client was an at-will employee of APL. This is important because generally, an at-will employee may be terminated for any reason or no reason. *See id*. at 73-74. One exception to this general rule is applicable when the termination violates a clear mandate of Maryland public policy. In such cases, a cause of action is recognized for the common law tort of wrongful discharge. *Id*. at 74-75. But to state a viable wrongful termination claim, the plaintiff's complaint must set forth facts showing that his or her termination violated a "clear mandate of public policy," otherwise, no cause of action for wrongful discharge will lie. *Id*.; *see also Porterfield v. Mascari II, Inc*., 374 Md. 402, 434 (2003) ("[T]here is no sufficiently clear mandate of public policy that has been violated on the facts alleged here such that vindication by bringing a wrongful discharge action is required to protect the public interest."); *Adler v. Am. Standard Corp*., 291 Md. 31, 45–46 (1981) ("The bald allegations of Adler's complaint do not provide a sufficient factual predicate for determining whether any declared mandate of public policy was violated. . . . The allegations are therefore legally insufficient to state a cause of action for wrongful discharge."). In order for a mandate of Maryland public policy to be

sufficiently established to support a claim of wrongful discharge, "there must be a preexisting, unambiguous, and particularized pronouncement, by constitution, enactment or prior judicial decision, directing, prohibiting, or protecting the conduct in question so as to make the Maryland public policy on the topic not a matter of conjecture or even interpretation." *King v. Marriott Int'l, Inc*., 160 Md. App. 689, 702 (2005) (quoting *Sears, Roebuck & Co. v. Wholey*, 139 Md. App. 642, 661 (2001) (hereafter "Wholey I") aff'd. 370 Md. 38 (2002). The source of the compelling public policy must be pled with particularity in the employee's complaint. *King*, 160 Md. App. at 703 (quoting *Porterfield v. Mascari II, Inc.,* 142 Md. App. 134, 140 (2002)).

Panessa argues that, though his employment with APL was "at will" he was fired as a result of having reported APL's "clear violations of federal laws" to his supervisors, and therefore, he stated a valid claim for common law wrongful discharge. In support of his claim, Panessa's complaint relies upon, *inter alia*, Maryland Code (2002, 2012 Repl. Vol.) §9-702(a) of the Criminal Law Article ("Crim. Law"), which provides, in relevant part: "(a) A person may not destroy, impair, damage, or interfere or tamper with real or personal property with intent to hinder, delay, or interfere with a defense-related activity." A violation of Crim. Law § 9-702 is a felony, punishable by a jail sentence of up to ten years, a fine up to $10,000, or both. Crim. Law § 9-702(b).

In his complaint, Panessa also relies upon a publication of the Maryland Department of Information Technology detailing the security standards to be applied by State agencies.

See Information Technology Security Policy and Standards, Maryland Dep't Budget and Management, Office of Information Technology (January 2007). Additionally, in support of his position, Panessa relies upon Maryland's Strategic Goals and Objectives for Homeland Security," Governor's Office for Homeland Security (January 15, 2009).

In addition, appellant relies in his complaint on three federal directives, *viz.*: 1) a presidential executive order directing relevant federal agencies to develop and implement procedures to protect against the improper disclosure of classified information, (Executive Order No. 12829, 58 Fed Reg. 3479 (January 8, 1993); 2) a manual issued by the U.S. Department of Defense, which, in pertinent part, sets forth requirements and procedures to be used by government agencies and contractors to prevent the unauthorized disclosure of classified information, i.e., The National Industrial Security Program Operating Manual ("NISPOM"), DoD 5220.22-M (Dep't of Defense February 28, 2006); and 3) a guide issued by the Defense Security Service, which provides instructions for government contractors investigating possible security violations. *See* The Administrative Inquiry Process Job Aid, Defense Security Service, Center for Development of Security Excellence (Dep't of Defense July 2011).

In this appeal, Panessa asserts that the "laws, regulations and pronouncements" of Maryland, "clearly reveal a public policy interest in protecting the security of confidential government information through the use of physical and electronic access control safeguards."

APL counters that none of the documents cited by Panessa state, "a clear mandate of Maryland public policy that is sufficiently narrow and identifiable to create liability for a wrongful discharge." Therefore, APL argues, the circuit court did not err by dismissing Panessa's complaint.

Because "'declaration of public policy is normally the function of the legislative branch[,]'"we shall first examine the Maryland statute cited by Panessa, which is found in Crim. Law § 9-702 and, as mentioned earlier, provides that "[a] person may not destroy, impair, damage, or interfere or tamper with real or personal property with intent to hinder, delay, or interfere with a defense-related activity." Nowhere in his complaint does Panessa allege that any crime, much less an intentional act of sabotage, was actually committed at APL. Though Panessa asserts that he could have reasonably believed that "APL's failure to secure the computer rooms constituted . . . acts criminalized" by section 9-702, he did not allege in his amended complaint that any person or entity took some affirmative action to damage or tamper with any of the rooms or computers that were left unsecured at APL. Nor does appellant allege that any failure to secure the rooms and computers was the result of a specific intent to interfere with a defense related activity, which is a prerequisite for a conviction under Crim. Law § 9-702(a). The fact that the failure to secure the rooms and computers may have "exposed APL to the risk" of such damage is not sufficient to support a reasonable inference that Panessa believed APL employees were engaged in acts of sabotage in violation of the criminal statute. In short, there is no mandate of public policy

embodied in section 9-702 upon which Panessa can rest his claim for wrongful discharge. *See Adler*, 291 Md. at 44 (holding that plaintiff had failed to plead a violation of public policy where plaintiff's counsel, "could not say one way or the other whether the claimed misconduct constituted a crime").

As for the two other Maryland documents that Panessa relies upon, both are publications of the executive branch, and any goals outlined therein relating to the protection of confidential information and enhancing national security apply only to the State's executive agencies. Neither document constitutes a law or even a regulation that is binding upon private entities such as APL. Neither incorporates or even refers to any federal laws or regulations relating to information security. Neither sets up any mechanism for reporting security breaches. And neither provides any protection for employees who report the misconduct of their employers. Moreover, the general, aspirational language contained in the documents is not a plain statement of public policy sufficient to support Panessa's claim for wrongful discharge.

Similarly, the three Federal documents upon which Panessa relies are, again, documents issued by entities of the executive branch, relating to federal standards that are established, monitored, implemented, interpreted, and enforced exclusively by federal agencies, and do not even address matters that are within the State of Maryland's power to regulate or enforce.

The tort of wrongful discharge is a state law claim intended to protect and further Maryland public policy interests. In previous cases, courts applying Maryland law have refrained from adopting federal laws or regulations, with no corresponding or interconnected Maryland counterparts, as declarations of Maryland public policy. *See Smaller v. The American National Red Cross*, 293 F.3d 148, 151, (4th Cir. 2002). ("Maryland courts, however, have given no indication that federal regulations or consent decrees constitute Maryland public policy."); *Parks*, 421 Md. at 86-87 (declining to adopt mandate of state public policy in regulations issued by the federal Food and Drug Administration).

Executive Order 12829, which was signed by the President of the United States, directs federal agencies to develop and implement procedures to protect against the improper disclosure of classified information. Pursuant to the federal executive order, each agency is empowered to direct and administer its own implementation and compliance with the program. *See* section 203(a). The order does not impose any obligation on the States or on any private party, such as APL.

The NISPOM (National Industrial Security Program Operating Manual), which was created in response to Executive Order 12829, provides guidelines and procedures for agencies and contractors to develop programs to protect classified information. Each agency is granted authority over its own security program. The NISPOM sets general minimum standards for various types of security programs, including computer security, security clearances, storing physical documents, securing communications, and allowing access by

subcontractors and foreign governments, but largely delegates to contractors the responsibility for designing programs that provide adequate security at each facility. For example, the NISPOM directs contractors to appoint a Facility Security Officer to oversee security procedures, to train their employees on security procedures, and to monitor and audit their security programs. The NISPOM also requires contractors to report losses, compromises, or suspected compromises of classified information, where a "compromise" is defined as a situation where it has been confirmed that identifiable classified information has been disclosed to an unauthorized individual. The NISPOM establishes several hotlines where employees of contractors may anonymously report security breaches. The guide issued by the Defense Security Service called "The Administrative Injury Job Aid (hereafter "Job Aid") does not create any requirements outside those contained in the NISPOM. Neither the NISPOM nor the Job Aid enumerates any sanctions for contractors who fail to follow the security protocols established therein. Pursuant to the NISPOM, each agency must set its own policies regarding the limitation or revocation of access to confidential materials for noncompliant contractors. Both the NISPOM and the Job Aid specify that individual contractors are independently responsible for investigating and identifying security problems and disciplining errant employees.

Panessa does not allege any facts from which it could be inferred, legitimately, that he reasonably believed that any secure information at APL was actually compromised, only that APL's failure to properly secure the rooms and computers in its facility could have

potentially resulted in disclosure of confidential or classified information. Nor does Panessa assert that he ever reported the security problems at APL via one of the hotline numbers created by NISPOM.

In all previous cases where a clear mandate of public policy has been found by a Maryland appellate court, the mandate has been discerned from a statute or regulation that provides penalties for engaging in the conduct at issue in the case. In *Wholey v. Sears Roebuck*, 370 Md. 28 (2002) ("Wholey II"), the statute prohibits any individual or entity from harming a victim or witness for reporting a crime to the police was the basis upon which the Court relied to define Maryland's public policy of protecting those who report suspected crimes to law enforcement officials. *Wholey II*, 370 Md. at 58-59. In *Insignia Residential Corp. v. Ashton*, 359 Md. 560 (2000) the criminal statute at issue prohibiting any individual from inducing or coercing a woman to engage in prostitution. Based on that statute, the Court held that Maryland public policy prohibited the termination of an employee for refusing to engage in sexual acts with her supervisor in order to keep her job because, if the employee had acquiesced, her conduct would have constituted prostitution." *Id*. at 562-63, 573. In *Ewing v. Koppers Co. Inc*., the Court decided that the statute making it a crime to discharge an employee for filing a claim for workers compensation set forth a clear mandate of public policy sufficient to support a claim for wrongful termination. 312 Md. 45, 48 n.2 (1988). Likewise, in *Bleich v. Florence Crittenton Service*, 98 Md. App 123, 134 (1993), this Court determined that the statute requiring teacher to report incidents of suspected child

abuse or neglect to the local authorities, and the regulations prohibiting employers from taking any adverse employment actions against employees for making such a report supported the teacher's wrongful termination claim. 98 Md. App. at 135-36. And, in *Moniodis v. Cook*, 64 Md. App. 10 (1985), this Court found that the language of the Maryland statute expressly prohibiting employers from demanding or requiring any applicant or employee to submit to a polygraph examination supported the employee's wrongful termination action. Each of these cases is clearly distinguishable from the case at hand. In each of the cited cases, the plaintiff was able to identify an explicit statement in a statute or regulation that directed, prohibited, or protected" the conduct (or contemplated conduct) in question." *Wholey I*, 139 Md. App. at 661.

The documents cited by Panessa do plainly suggest that protecting national security is a concern for both the State and Federal governments. Nevertheless, no sufficiently clear mandate of Maryland public policy supports Panessa's claim for wrongful discharge. The documents identified in Panessa's complaint included broadly worded policies and goals that grant broad discretion to multiple entities to interpret and implement the goals outlined therein. While protecting national security is indisputably a "matter of great importance" and surely serves "the public good[,]" such abstract notions do not constitute a clear mandate of Maryland public policy. *See Wholey II*, 370 Md. at 65-66 (declining to find a general mandate of public policy protecting an employee who independently investigated and internally reported criminal activities occurring on the premises of his employer, opining that

it constituted "an esoteric theory about acting in the 'public good'"); *Bleich,* 98 Md. App. at 134 (1993) (holding that constitution mandate did not protect a private employee from retaliation even for speech that was "on matters of great importance").

III. CONCLUSION

For the reasons stated above, we hold that Panessa failed, on the face of his complaint, to state with particularity the source of the public policy APL allegedly violated. Therefore, the circuit court did not err in dismissing that complaint.

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.