

ORIGINAL

IN THE SUPREME COURT OF OHIO

Donald Lee	:	Case No. 13-1400
	:	
Appellee,	:	On Appeal from the Morrow
	:	County Court of Appeals, Fifth
v.	:	Appellate District
	:	
Village of Cardington, Ohio	:	Court of Appeals
	:	Case No. 2012 CA 0017
Appellant.	:	

**APPELLANT/CROSS-APPELLEE VILLAGE OF CARDINGTON'S
MEMORANDUM IN OPPOSITION TO APPELLEE/CROSS-APPELLANT'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

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APPELLEE/CROSS-APPELLANT'S PROPOSITION OF LAW NO. 1

The Court below did not err by finding that Appellee/Cross-Appellant Failed to Satisfy the Jeopardy Element of His Tort Claim for Wrongful Discharge in Violation of Public Policy

STATEMENT OF FACTS

Although a point of emphasis in his briefing, Cross-Appellant never raised the issue of potential water pollution with the Village of Cardington, the Ohio Environmental Protection Agency, or the Federal Environmental Protection Agency. In fact, a review of Cross-Appellant's Complaint reveals that there are no allegations that Cross-Appellant complained about water pollution by the Village to anyone. Rather, Cross-Appellant's Complaint identified two specific concerns.

First, Cross-Appellant alleges that he had an EPA permit to accept sludge, but would no longer do so after the presence of an unidentified contaminant was detected. The record established the following undisputed facts: (1) despite the presence of the contaminant, the sludge was still passing the EPA's monthly tests [Lee depo. at 39, l. 4-21]; (2) relative to acceptance of the sludge, Lee was concerned with his own liability exposure [Lee depo. at 39, l. 4-21]; and the Village had the sludge transported to an EPA approved landfill [Lee depo. at 33, l. 9-23]; ergo, there was nothing for Cross-Appellant to report or complain about. Indeed, the statute identified by Cross-Appellant's counsel (as opposed to Cross-Appellant himself), R.C. § 6111.40, is simply a permitting statute. It is not criminal in nature, nor referenced in the criminal penalty statute—R.C. § 6111.99. Thus, the statute could not have served as the basis of a reasonable belief that the Village was violating a clear public policy because the sludge has passed the EPA's tests and was, subsequently, disposed of in a proper manner.

Second, Cross-Appellant alleges that he had a dispute with his supervisor over the cost of purchasing equipment to address problems at the Village's wastewater treatment plant. Cross-

Appellant alleged that his solution would cost the Village \$100,000. However, Cross-Appellant did not have an engineering degree [Lee depo. at 11, l. 13-16], nor even the most basic of wastewater treatment licenses. Lee depo. at 11, l. 18-22.

Despite the lack of qualifications, Cross-Appellant opined that the engineering firm's proposal, which would cost \$760,000, "was not feasible and probably would not work." Complaint ¶11. Cross-Appellant also alleged that he questioned budget proposals presented by his supervisor, Dan Ralley, to Village Council. *Id.* at ¶12. Cross-Appellant concludes the factual allegations of the Complaint by stating that "As a direct and proximate result of Plaintiff's reporting problems with the sewage treatment plant, his opposition to some of the proposals and projects advanced by the village, and his support for the work of the EPA, Plaintiff was removed from his position on April 21, 2009. *Id.* at ¶13.

Even assuming *arguendo* Cross-Appellant's version of events, this dispute did not violate any clear public policy, nor implicate the whistleblower statute. More importantly, although Cross-Appellant devoted considerable time and energy in opposing summary judgment based upon his *post hoc* allegations concerning alleged water pollution by the Village, Cross-Appellant's Complaint is silent on that subject. Facing summary judgment on both his whistleblower and wrongful discharge in violation of public policy because Cross-Appellant did not identify any alleged action by the Village which violated criminal or environmental law, Cross-Appellant concocted a new theory of liability.

From day one, the Village has been consistent in its position that it was the victim of an environmental crime, not the perpetrator. Cross-Appellant's own admissions during his deposition established that the Village had done nothing wrong.

In his Brief, Cross-Appellant has claimed that the Village has relied upon evidence outside the record to establish that fact. That argument is half true.

On February 13, 2013, the Village filed a Motion for Court to Take Judicial Notice in the court of appeals.¹ The Judgment Entries for which judicial notice was requested were a file-stamped copy of Cardington Yutaka Technologies September 12, 2012 Plea Agreement in *U.S. v. Cardington Yutaka Technologies, Inc.*, United States District Court, Southern District of Ohio, Case No. 2:11-CR-140, and the January 24, 2013 Consent Order in *State ex rel. DeWine v. Cardington Yutaka Technologies, Inc.*, Morrow County Common Pleas Case No. 2012-CV-0443. They are part of the appellate record by virtue of having been presented to the court of appeals.

As the victim of the crime, the Village was to receive \$115,000 in restitution and an additional \$400,000 as community service for the repair, maintenance, improvement, and

¹ The Motion was predicated upon Evid. R. 201(C), "[a] court may take judicial notice, whether requested or not, of adjudicative facts." *In re Randolph* (11th Dist.), 2005 Ohio 414, ¶56. Furthermore, under Evid. R. 201(F), "judicial notice may be taken at any stage of the proceeding." *Id.*

Specifically, it appears that this Court has opined that an appellate court may take judicial notice of court decisions and public records on appeal. See *State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 197, 2007 Ohio 4798, ¶11; 874 N.E.2d 51, citing with approval *Stutzka v. McCarville* (8th Cir. 2005), 420 F.3d 757, 761, fn. 2 (court takes judicial notice of judicial opinions and public records on motion to enlarge record in appeal). "Although this court's ability to take judicial notice is not unbridled, we may take judicial notice of findings and judgments as rendered in other Ohio cases." *State ex rel. Ormond v. City of Solon* (8th Dist.), 2009 Ohio 1097, ¶15, citing, inter alia, *Morgan v. Cincinnati* (1986), 25 Ohio St.3d 285, 496 N.E.2d 468; see also *Stancourt v. Worthington City Sch. Dist. Bd. of Educ.* (10th Dist.), 164 Ohio App.3d 184, 192, fn. 3; 2005 Ohio 5702, ¶18, 841 N.E.2d 812, 817, citing *In re Lassiter* (1995), 101 Ohio App.3d 367, 374, 655 N.E.2d 781, appeal not allowed, 73 Ohio St.3d 1410, 651 N.E.2d 1308 (stating that an appellate court may take judicial notice of a court's finding in another case); Civ.R. 44.1(A)(1) (providing that "judicial notice shall be taken of the rules of the supreme court of this state and of the decisional, constitutional, and public statutory law of this state"); Evid.R. 201 (judicial notice of adjudicative facts).

renovation of the Village's wastewater treatment plant. In contrast, the Village was never cited, fined, charged, sanctioned, penalized, or even threatened with such potential exposure. In sum, given the foregoing and his own admissions, Cross-Appellant did not advise the Village that he believed it had violated any clear public policy, nor would have such a belief been reasonable.

LAW AND ARGUMENT

A. PLAINTIFF-APPELLEE FAILED TO SATISFY THE CLARITY ELEMENT.

Since Cross-Appellant starts his argument with the clarity element, so too will the Village. In the case *sub judice*, the "clarity" element was lacking. This case would present the opportunity to apply and extend *Dohme v. Eurand Am., Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609.

1. The *Dohme* holding requires more than a generalized recitation of law.

In *Dohme*, the Court stated "In an action claiming wrongful termination, the terminated employee must assert and prove a clear public policy deriving from the state or federal constitutions, a statute or administrative regulation, or the common law." *Id.*, 130 Ohio St.3d at 172. "To satisfy the clarity element of a claim of wrongful discharge in violation of public policy, a terminated employee must articulate a clear public policy by citation to specific provisions in the federal or state constitution, federal or state statutes, administrative rules and regulations, or common law." *Id.* at 173-174. "In this case, we conclude, as did the trial court, that Dohme failed to meet his requisite burden to articulate, by citation to its source, a specific public policy that Eurand America violated when it discharged him. Dohme's complaint simply alleged that Eurand America's actions "jeopardized workplace safety." *Id.* at 172.

Subsequent to the *Dohme* decision, Ohio appellate courts have applied this Court's holding in the same fashion. See, e.g., *Elam v. Carcorp, Inc.*, 2013-Ohio-1635, ¶10 (10th Dist.), citing *Cruse v. Shasta Beverages, Inc.*, 2012 Ohio 326, ¶ 36 [citing *Dohme* at ¶ 23 (holding

"[u]nless the plaintiff asserts a public policy and identifies federal or state constitutional provisions, statutes, regulations, or common law that support the policy, a court may not presume to *sua sponte* identify the source of that policy" or "fill in the blanks" for the plaintiff)].

2. The Complaint did not comply with *Dohme*, i.e. it did not set forth a clear and specific public policy the employer allegedly violated.

In the Complaint, Cross-Appellant Lee did not identify any specific provisions in federal or state statutes or administrative code. Instead, in Complaint ¶20, all Lee did was state ““At the time of Plaintiff’s termination, a clear public policy existed and manifested in the state constitution, federal constitution, federal and state statutes, the Code of Federal Regulations, Ohio Administrative Code, and/or in Ohio Common Law.” *Ab initio*, Cross-Appellant Lee should have known what clear public policy was allegedly being violated by the Village. The failure and/or inability to articulate anything specific is telling. What should have been done and where should the analysis start?

3. As a threshold matter, the employee must clearly and specifically identify what violation of public policy is he is complaining to his employer about.

The analysis must start with the employer’s knowledge. What did the employee allegedly tell the employer?

Lee never claimed that he was telling the Village that he believed the Village was violating any Ohio public policy, nor did he cite any specific statute or administrative regulation. Facing the likelihood of summary judgment on the Complaint, the statutes and administrative codes cited in the Opposition to the Motion for Summary Judgment were purely the product of Lee’s counsel’s legal research. Indeed, there wasn’t a single piece of evidence produced, including Lee’s own Affidavit, where Lee claims that he cited any specific provision of the Ohio Revised Code, the Ohio Administrative Code, or even a federal statute to the Village that he

believed the Village was violating. In this respect, the case *sub judice* is not unlike *Whitaker v. FirstEnergy Nuclear Operating Co.*, 2013-Ohio-3856 (6th Dist.), where the plaintiff-employee also did not specify the sources of public policy in his complaint. In rejecting the plaintiff-employee's appeal of summary judgment, the court of appeals observed: "Notably, Whitaker did not cite this statutory authority in his complaint. He provided citations only after appellees moved for summary judgment." *Id.* at ¶21, fn. 1.

Likewise, in *Camick v. FirstEnergy Nuclear Operating Co.*, 2013-Ohio-4519 (6th Dist.), the plaintiff employee did a little more than Lee did here; namely, he attempted to generally reference a couple of federal statutes [29 U.S.C. 660(c)(1), a statute governing the Occupational Safety and Health Administration, and the federal Energy Reorganization Act of 1974 and the Energy Policy Act of 1992]. Nonetheless, the court of appeals in *Camick* found such allegations legally insufficient to satisfy the clarity element: "We agree with the trial court; appellant failed to satisfy the clarity element by making specific reference to a state or federal constitution, statute or administrative regulation, or common law provision that is applicable to his discharge from employment. This is sufficient to defeat appellant's claim." *Camick, id.* at ¶28.

Presumably, another reason why Ohio's courts have required a clear statement of the public policy the employee is relying upon is to prevent what occurred in this case--sandbagging. At the employer level, the employee should not be permitted to make some general or vague reference to an alleged violation of law which might implicate a clear public policy and then turn around and play the "gotcha" game. The same principle as well applies at the next level—when the plaintiff-employee files the complaint. The employer-defendant should not have to guess at what "clear public policy" it allegedly violated.

Under the circumstances of this case and others like it, as a matter of law, Lee's wrongful discharge in violation of public policy claim failed—just as the claims did in *Dohme*, *Elam*, *Cruse*, *Camick*, and *Whitaker*. This Court should not re-visit the trial court's and appellate court's decision granting summary judgment in favor of the Village.

4. Employer knowledge must be a prerequisite for potential liability.

Why does the employee have to be clear and specific in identifying the public policy his or her employer allegedly violated? In this context, the gravamen of a wrongful discharge in violation of public policy claim contemplates an adverse employer reaction to an employee complaint. If the employer or appointing authority doesn't have knowledge of the employee's allegations and isn't made aware of what violation of public policy the employee is complaining about, then logically, the employee's espousal of a public policy can't be the cause of a discharge. Stated more simply, how could the employer react to something it is not made aware of?

In this case, Lee presented no evidence at the trial court level that he made anyone at the Village aware that he was engaging in public policy based action predicated upon the various statutes he cited in his Opposition to the Village's Motion for Summary Judgment. Quite frankly, the only thing the record supports that Lee complained about was how much money the Village was going to spend on updating the sanitary sewer treatment plant. In that instance, the Village's sin was relying upon the advice of its retained professional engineer as to how to address the problems, rather than accept the suggestions of Lee, who had no engineering training or degree.

In any event, absent notice to Village Council, the decisionmaker relative to his termination, Village Council obviously could not have been reacting to alleged violations of

public policy that were never brought to their attention. Essentially, the citation of the various statutes and codes in the Opposition to the Village's Motion for Summary Judgment was nothing more than an *ad hoc* argument manufactured by his legal counsel more than three years after his separation. That didn't work at the trial court level and, hopefully, won't work here either.

5. To the extent that the wrongful discharge in violation of public policy is intended to be an analogue of a whistleblower claim, i.e. cover circumstances not addressed by the whistleblower act itself, the employee would need to specifically and clearly identify what he was complaining about to the outside third party or agency with jurisdiction over such matters.

To the extent that a plaintiff-employee is essentially attempting to expand the "whistleblower" statute to subject matter beyond that contained in the statute, one element of the claim would necessarily require that the clarity element be satisfied when making a claimed violation of public policy to a third party or agency with authority to address such matters. Stated another way, the outside prosecutor, regulatory authority, or agency would need to know specifically what the plaintiff-employee is claiming the employer did to clearly violate public policy. See, e.g., *Jamison v. American Showa* (5th Dist.), 1999 Ohio App. LEXIS 6212 ("R.C. 4113.52(A)(1) protects an employee for reporting certain information *to outside authorities....*").

At some point, for there to be a "whistleblower" type cause and effect, the employer would have to become aware of the employee's action, e.g. (1) the plaintiff-employee would have to notify the employer of this communication or the outside prosecutor, regulatory authority, or agency; (2) the outside prosecutor, regulatory authority, or agency would notify the employer directly of the employee's allegations.

In any event, for there to be a wrongful discharge in violation of a clear public policy, which essentially would be the employer's reaction to the employee's communication/report, the

employer would necessarily need to be aware that such a communication had occurred. Otherwise, the absence of such evidence would necessarily preclude a cause and effect relationship between the employee's allegations and the employer's termination.

In the case *sub judice*, no such evidence was presented. The Federal EPA, whose employees cannot be subpoenaed to testify based upon the Federal Code of Regulations, confirmed that it had no record of any kind from Lee concerning the case *sub judice*. Likewise, the Ohio EPA representative, who did provide an Affidavit, confirmed that there was nothing in the Ohio EPA's records reflecting any communication from Lee regarding alleged violations of the law by the Village. Why? Because as alleged in Complaint ¶ 10 and Lee's deposition testimony, neither the Ohio EPA nor the Federal EPA were ever after the Village of Cardington:

In 2007, the Ohio EPA came into the Village and did a two-day inspection of the Village's wastewater treatment plant. The Ohio EPA **ruled out** the Village's procedures and employees as the source or cause of any problems with the Village's wastewater treatment plant. Indeed, Lee testified as follows:

Q Okay. In terms of procedures, it's my understanding that the EPA had indicated that the Village was doing things procedurally correct; is that right?

A They came in and went through a two-day review of our operation.

Q Do you remember when that was?

A That would have been in 2007.

Q Do you remember what time of the year it was?

A Springtime.

Q And did they focus solely on wastewater, or did they also look at the water distribution system?

A Just the wastewater plant operation.

Q *** And I think you'd indicated earlier that everything was being done procedurally; is that correct?

A **Their comment was "We wish all our wastewater plants were being run with this kind of an operation that takes care of the problems and works on 'em."**

Q Okay.

A So **they were satisfied that we were operating the plant correctly.**

Q And that included not only the procedures, but that the employees themselves were doing their jobs correctly?

A Yes. By that time we had Mike Chapman licensed. The second person was proceeding to work on getting his license so we had a backup.

Q I take it, then, that the EPA at that point in time, in 2007, had basically **ruled out the Village of Cardington as being the problem or cause** of why your bacteria was dying?

A **That is true.**

Q *** And given that the Village was not the cause, I take it that that led the investigation elsewhere to look at other potential causes of the problem?

A Yes.

Q *** And did there come a point in time when the EPA advised you that it was going to investigate Cardington Yutaka Technologies to determine whether it was a source of the problem at the Village's wastewater plant?

A Yes.

Lee depo. at 25, l. 16 to 27, l. 22. Given that the Village was operating its Wastewater Treatment Plant in an exemplary manner, there wasn't any reason for Lee (or, for that matter, the EPA) to believe the Village was committing a criminal violation of any kind. Given the feedback Lee received from the EPA, such a belief would be totally irrational.

Lee made no report of a violation of clear public policy to the Village because there was never anything to report.

B. LEE DID NOT SATISFY THE JEOPARDY ELEMENT AS A MATTER OF LAW.

Generally, a plaintiff-public employee fails to state a wrongful discharge in violation of public policy claim under Ohio law because where there are available statutory or administrative remedies. *Provens v. Stark Cty. MRDD Board* (1992), 64 Ohio St.3d 252. In *Leininger v. Pioneer Nat'l Latex* (2007), 115 Ohio St.3d 311, 317, 2007 Ohio 4921, ¶ 27, the Court concluded that "it is unnecessary to recognize a common-law claim when remedy provisions are an essential part of the statutes upon which the plaintiff depends for the public policy claim and when those remedies adequately protect society's interest by discouraging the wrongful conduct." Correlatively, in *Meyer v. UPS* (2009), 122 Ohio St.3d 104, the Ohio Supreme Court held that:

Based upon the clear mandate of the *Leininger* standard, the causes of action alleged by appellant under a public policy tort claim fails to meet the "jeopardy" element test.

In *Leininger v. Pioneer Natl. Latex*, 115 Ohio St. 3d 311, 2007 Ohio 4921, 875 N.E.2d 36, at the syllabus, we recently held that "[a] common-law tort claim for wrongful discharge based on Ohio's public policy against age discrimination does not exist, because the remedies in R.C. Chapter 4112 provide complete relief for a statutory claim for age discrimination."

In *Leininger*, the Court's focus "was whether the statutory remedies for employment-related age discrimination 'adequately protect society's interest by discouraging the wrongful conduct,' and thus render a public-policy wrongful-discharge claim unnecessary." *Leininger*, 115 Ohio St. 3d 311, 2007 Ohio 4921, ¶27, 875 N.E.2d 36.

Meyer, 122 Ohio St.3d at 112; see also *Wiles v. Medina Auto Parts* (2002), 96 Ohio St.3d 240 (refusing to recognize public policy claim where remedies are available under the Family and Medical Leave Act); *Bickers v. W. & S. Life Ins. Co.* (2007), 116 Ohio St. 3d 351 (applying same bar to workers compensation retaliation claim where statutory remedy available under R.C. §

4123.90); *McDannald v. Robert L. Fry & Associates, Inc.* (12th Dist.), 2008 Ohio 4169 (trial court's grant of summary judgment to the employer on plaintiff-employee's wrongful discharge in violation of public policy claim affirmed because his exclusive remedy was under R.C. § 4123.90); *Mortensen v. Intercontinental Chemical Corp.* (1st Dist. 2008), 178 Ohio App.3d 383, 397, 2008 Ohio 4723, at ¶13 (*Bickers* makes R.C. 4123.90 the exclusive remedy for an employee terminated for filing a workers' compensation claim).

Morrow County is located in the Fifth Appellate Judicial District. In *Carpenter v. Bishop Well Services Corp.* (5th Dist.), 2009 Ohio 6443, had addressed the same legal issue raised by Lee in this case; namely, whether a plaintiff-employee who claims to be a "whistleblower" can bring a wrongful discharge in violation of public policy claim. In answering that question in the negative, the *Carpenter* court stated as follows: "Ohio's 'whistleblower' statute, R.C. 4113.52, provides for parallel civil remedies for retaliation discharge. See, Subsections (B) and (C). Based upon the clear mandate of the *Leininger* standard, the causes of action alleged by appellant under a public policy tort claim fails to meet the 'jeopardy' element test." *Id.* at ¶¶ 37-38.

In *Siemaszko v. FirstEnergy Operating Co. (FENOC)*, 187 Ohio App.3d 437 (6th Dist. 2010), the Sixth District court of appeals has reached the same conclusion. "A common law cause of action for wrongful discharge based upon the federal or state whistle-blower statute is limited because the plaintiff must strictly comply with the requirements of the statute in order to constitute an employee who was wrongfully discharged." *Kulch, supra*, at 151-152, and *Contreras, supra*, at 250-251. R.C. 4113.52 provides only a limited cause of action. *Kulch, supra*, at 152." *Siemaszko* at 443.

The main problem with Cross-Appellant's analysis is that he is claiming the Village violated certain environmental statutes. Each of the environmental statutes which Lee relied upon at the trial

court level are included within the protection afforded by R.C. § 4113.52(A)(2). Thus, there is no reason for this Court to recognize a new or additional claim for relief. This is particularly so when it is Cross-Appellant's own failure to comply with the requirements of the whistleblower statute, which made the statute inapplicable.

CONCLUSION

The Village did nothing wrong in this case and was, in fact, the victim of an environmental crime committed by a third party—Cardington Yutaka Technologies. From day one, Cross-Appellant's wrongful discharge claims have been nothing more than an employee with a bruised ego, who thought he knew more than the professional engineer the Village consulted to assist it in upgrading and maintaining the sanitary sewer treatment plant.

As evidenced by both the Complaint and his deposition testimony, Cross-Appellant knew that the Village itself had done nothing wrong. To the contrary, Cardington Yutaka Technologies entered into plea agreements with both the U.S. Attorney and Ohio Attorney General, acting on behalf of the U.S. EPA and Ohio EPA respectively, which would pay the Village over \$515,000 toward its sanitary sewer treatment plant. Correlatively, there was no evidence in the record, not one iota, that the Village was ever cited, fined, charged, threatened, or sanctioned by either the Ohio EPA or Federal EPA. There was no violation of a clear public policy by the Village in this case and Appellee-Cross Appellant's Proposition of Law should be rejected.

Respectfully submitted,

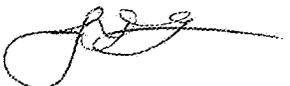
John D. Latchney



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CERTIFICATE OF SERVICE

A copy of Appellant Village of Cardington's Memorandum in Opposition to Appellee/Cross-Appellant's Memorandum in Support of Jurisdiction was served via regular U.S. Mail on this 28th day of October 2013 upon: D. Wesley Newhouse and Michael S. Kolman, Newhouse, Prophater, Letcher & Moots, LLC, 5025 Arlington Centre Blvd., Suite 400, Columbus, Ohio 43220, *Attorney for Appellee/Cross-Appellant.*

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