

IN THE SUPREME COURT OF OHIO

ORIGINAL

JOSEPH C. SOMMER,

Case No. 2014-0230

Plaintiff-Appellant,

On Appeal from the Franklin  
County Court of Appeals,  
Tenth Appellate District

-vs-

OHIO BUREAU OF  
WORKERS' COMPENSATION,

Court of Appeals Case No.  
13AP-412

Defendant-Appellee.

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MEMORANDUM IN OPPOSITION TO JURISDICTION OF DEFENDANT-APPELLEE  
OHIO BUREAU OF WORKERS' COMPENSATION

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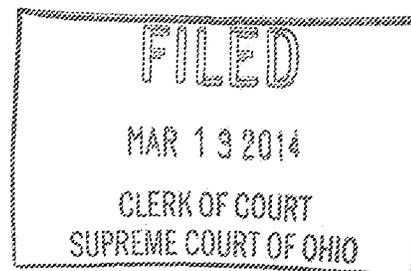
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## INTRODUCTION

This Court should not accept jurisdiction over this appeal regarding whether the Ohio Bureau of Workers' Compensation ("BWC") properly issued a written reprimand to now-retired Joseph Sommer, back in 2009. Sommer received the written reprimand because he sent a personal email from his work email address while on state time. The email contained a signature block identifying Sommer as an attorney for BWC and including his work telephone number. By sending this email, Sommer created the appearance that he was speaking on behalf of BWC when, in fact, he was not. Sommer sent the email to the Ohio Inspector General's ("OIG") office claiming that the members of the Industrial Commission Nominating Council ("ICNC") had unlawfully failed to submit the names of potential candidates in a timely fashion. The email also called the council members scofflaws. Sommer chose to send the email from his work email address on state time. Since he was not speaking on behalf of BWC, his supervisor gave him a written reprimand.

Sommer claims that his email to the OIG was a whistleblower document pursuant to R.C. 124.341(A), and his reprimand was therefore unlawful retaliation. Sommer's claim is without merit. As the appellate court found, Sommer's email was not a whistleblower document because the express language of R.C. 124.341(A) states that only complaints filed with the OIG which allege a criminal violation are considered to be whistleblower reports. Sommer's email did not allege a criminal violation. Thus, he is not a whistleblower. The appellate court's decision was consistent with the language of the statute and the appellate court's previous decisions regarding R.C. 124.341. Moreover, the General Assembly has already responded to address any concern about non-criminal reports to the OIG being excluded from whistleblower protection by R.C. 124.34. There are currently two bills, H.B. No. 426 and H.B. No. 439, that have been introduced

before the 130<sup>th</sup> General Assembly, which, if passed, would amend R.C. 124.341 to provide whistleblower protection for a report, such as the one filed by Sommer.<sup>1</sup> Accordingly, Sommer's claim that BWC violated Ohio's public employee whistleblower statute, R.C. 124.341, by reprimanding him is without merit, and this court should decline to accept jurisdiction over the matter.

### STATEMENT OF THE CASE AND FACTS

BWC employed Sommer as an attorney in its legal department. *Sommer v. Bur. of Workers' Comp.*, 10<sup>th</sup> Dist. Franklin No. 13AP-412 ¶ 8 (Dec. 30, 2013) ("App. OP."). In 2009, Sommer sent an email to Deputy Inspector General Joseph Montgomery. *Id.* The subject of Sommer's email was his belief that the ICNC might not have been following the requirements set forth in R.C. 4121.02(D). *Id.* In his email, Sommer asked "if the council is composed of scofflaws, what quality of persons can we expect them to submit for appointment to the Commission?" *Id.*

Sommer sent the email from his state computer, on state time, and used his state email address. (Affidavit of Tom Sico, Attachment D to Appellee's Appellate Brief, ¶ 4). The email included a signature block that identified Sommer as an attorney for BWC and included his work telephone number. (*Id.* at Ex. 1). Sommer did not send this email at the direction of anyone at BWC, nor was it sent in the scope and course of his normal job duties. (*Id.* at ¶ 4).

When General Counsel for BWC learned about Sommer's email to Montgomery the counsel was concerned that by sending the email using his work email address, identifying himself as a BWC attorney, and including his work telephone number, Sommer gave the

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<sup>1</sup> Links to the aforementioned bills can be found respectively at the following websites: [http://www.legislature.state.oh.us/bills.cfm?ID=130\\_HB\\_426](http://www.legislature.state.oh.us/bills.cfm?ID=130_HB_426), and [http://www.legislature.state.oh.us/bills.cfm?ID=130\\_HB\\_439](http://www.legislature.state.oh.us/bills.cfm?ID=130_HB_439)

impression that the email was sent on behalf of the BWC. (*Id.* at ¶ 7). General Counsel was especially concerned that the email compromised the ability of BWC's Executive Leadership Team to work with members of the ICNC. *Id.*

Based upon these concerns about how Sommer sent his email to Montgomery, BWC General Counsel issued Sommer a written reprimand. (App. Op. at ¶ 10). At the time of the reprimand, the General Counsel was acting as Sommer's direct supervisor. (Sico Aff. ¶ 8).

Sommer appealed the reprimand to the State Personnel Board of Review ("SPBR") captioned 10-WHB-01-0012, based upon the written reprimand that he received from BWC. An Administrative Law Judge ("ALJ") issued a Report and Recommendation which found that Sommer had set forth a *prima facie* case for whistleblower retaliation, but that a written reprimand did not rise to the level of prohibited retaliatory action set forth in R.C. 124.341, and SPBR should thus dismiss Sommer's appeal.

SPBR agreed with the recommendation and issued a final order dismissing Sommer's appeal, but differed from the ALJ as to the rationale. SPBR held that BWC disciplined Sommer for sending a personal email from his work computer and work email address, not because he engaged in conduct protected by R.C. 124.341.

Sommer appealed SPBR's order to the Franklin County Court of Common Pleas, which remanded to the SPBR, which in turn remanded to the ALJ. After a proceeding on the briefs, the ALJ issued an R&R in which she found that BWC had presented evidence to support the SPBR's previous order, and she thus recommended that Sommer's appeal be dismissed. On December 20, 2012, SPBR adopted the recommendation of its ALJ and dismissed Sommer's appeal.

Sommer again appealed to the Franklin County Court of Common Pleas. Sommer argued that SPBR's finding that BWC had a legitimate basis for issuing him the written reprimand conflicted with subsections (B) and (C) of R.C. 124.341. The Court affirmed the SPBR decision.

Sommer then appealed to the Tenth District Court of Appeals. On December 30, 2013, the appellate court dismissed Sommer's appeal on the grounds that "appellant's conduct [did] not fall within the scope of R.C. 124.341(A) because that statute did not authorize appellant to report to the Inspector General the alleged non-criminal statutory violations that were the subject of appellant's emailed report." (App. Op at ¶ 6).

Sommer now appeals to this Court.

**THIS CASE PRESENTS NO QUESTIONS OF  
PUBLIC OR GREAT GENERAL INTEREST**

The issue of whether BWC properly issued Sommer a written reprimand in 2009 is not a matter of public or great general interest.

However, even if this court were to view whistleblower protection for written reports of non-criminal activity to the OIG by state employees as a question of public or great general interest, it does not change the fact that the plain language of R.C. 124.341(A) only protects reports to the OIG of criminal matters. Moreover, to the extent that this issue is matter of public or great general interest, it has been addressed by the General Assembly. H.B. No. 426 and H.B. No. 439 have been introduced before the 130<sup>th</sup> General Assembly, which, if passed, would amend R.C. 124.341 to provide whistleblower protection for a report, such as the one filed by Sommer. Accordingly, there is no need for this Court to address the issue.

Second, any decision by this Court as to whether BWC set forth a legitimate reason for reprimanding Sommer would likely be limited to the specific factual scenario presented in this case. It cannot be overlooked that BWC employed Sommer as an attorney, and attorneys act as

representatives for their respective clients. Thus, by emailing the OIG from his state email address, on state time, and identifying himself as an attorney for BWC, who could be reached at his work phone number, it is reasonable to find that someone reviewing his email could conclude that Sommer was speaking on behalf of BWC. Accordingly, a decision about whether BWC had a legitimate reason for reprimanding Sommer would likely be limited to the unique set of facts presented in this case.

Lastly, any decision by this court would have no effect on the parties. Sommer did not lose any pay or benefits from BWC as a result of the reprimand. On December 17, 2010, the reprimand was removed from Sommer's personnel file. As the appellate court noted, the removal of the written reprimand was consistent with Ohio Adm.Code 123:1-46-07(A), which requires any oral/written reprimand to be removed from an employee's personnel file after twelve months, provided there has been no other discipline. Moreover, in July of 2011, Sommer retired from BWC. Thus, there is no tangible relief that Sommer would receive should this Court accept jurisdiction over this case and ultimately rule in his favor.

### **LAW AND ARGUMENT**

**Appellee's Proposition of Law No. 1: The Tenth District ruled consistently with its own precedent in concluding that Sommer's email to the OIG did not trigger the statute.**

The appellate court did not fail to follow the principle of *stare decisis* as Sommer asserts. First, if Sommer believed that the appellate court's decision is in conflict with its previous decision, then he could have requested an en banc review, pursuant to App.R. 26(A)(2). He did not. Moreover, the appellate court's decision is consistent with its previous decisions. None of the case cited by Sommer conclude that a non-criminal, written report to the OIG is a whistleblower document protected by R.C. 124.341. *Khalaq v. Ohio Environmental Protection*

*Agency*, 10<sup>th</sup> Dist. Franklin No. 09AP-963, 2011-Ohio-1087; *Vivo v. Ohio Bur. of Workers' Comp.*, 10<sup>th</sup> Dist. Franklin No. 09AP-110, 2009-Ohio-6417; *Wade v. Ohio Bur. of Workers' Comp.*, 10<sup>th</sup> Dist. Franklin No. 98AP-997, 1999 WL 378409 (June 10, 1999); see also *Haddox v. Ohio State Atty. Gen.*, 10<sup>th</sup> Dist. Franklin no. 07-AP-857, 2008-Ohio-4355, discretionary appeal not allowed, *Haddox v. Ohio State Atty. Gen.*, 120Ohio St.3d 1506, 2009-Ohio-361. Moreover, none of these cases involve a written report filed with the OIG. Accordingly, the Tenth District has never found that a non-criminal report filed with OIG is entitled to whistleblower protection. Consequently, the appellate court's decision is not conflict with any of these previous cases.

In *Ressler v. Ohio Dept. of Transp.*, 10<sup>th</sup> Dist. Franklin No. 09-AP-338, 2009-Ohio-585, the alleged whistleblower document was a written report sent to the OIG, but it was treated by the OIG as a bomb threat. The court did not address whether the alleged bomb threat constituted a criminal violation. Rather, the court affirmed the dismissal of the appeal on the grounds that the appellant had not actually written the report but merely acted as a courier by transmitting the report to the OIG. *Ressler* at ¶ 18; see also *Haddox* at ¶ 44. Again, while the report at issue was transmitted to the OIG, the court never addressed the issue of whether the report set forth a criminal violation necessary for protection under the statute. Thus, the appellate court's decision below is not in conflict with the appellate court's decision in *Ressler*.

As Sommer has failed to demonstrate that the appellate court ruled in a manner that is inconsistent with its previous decision, he has thus failed to show that the appellate court failed to follow *stare decisis*. Accordingly, Sommer's first proposition of law is without merit.

**Appellee's Proposition of Law No. 2: The appellate court applied the plain meaning of the statute when it concluded that Sommer's email did not trigger the statute.**

Sommer fails to show that the appellate court neglected to give due deference to SPBR's

interpretation of R.C. 124.341. Sommer cites to several cases which indicate that deference to an administrative agency's interpretation of a statute should be given where the agency's interpretation is reasonable. As this Court has previously held, "[i]n interpreting a statute, we must begin by examining its express terms." *State ex rel. Cuyahoga Cty. v. State Personnel Bd. of Review*, 82 Ohio St.3d 496, 498, 696 N.E.2d 1054 (1998), citing *Freedom Rd. Found. v. Ohio Dept. of Liquor Control*, 80 Ohio St.3d 202, 206, 685 N.E.2d 522 (1997). That is what the appellate court did here. R.C. 124.341(A) states:

If an employee in the classified or unclassified service becomes aware in the course of employment of a violation of state or federal statutes, rules, or regulations or the misuse of public resources, and the employer's supervisor or appointing authority has authority to correct the violation or misuse, the employee may file a written report identifying the violation or misuse with the supervisor or appointing authority. In addition to or instead of filing a written report with the supervisor or appointing authority, the employee may file a written report with the office of internal audit created under section 126.45 of the Revised Code or file a complaint with the auditor of state's fraud-reporting system under section 117.103 of the Revised Code.

If the employee reasonably believes that a violation or misuse of public resources is a criminal offense, the employee, in addition to or instead of filing a written report or complaint with the supervisor, appointing authority, the office of internal audit, or the auditor of state's fraud reporting system, may report it to a prosecuting attorney, director of law, village solicitor, or similar chief legal officer of a municipal corporation, to a peace officer, as defined in section 2935.01 of the Revised Code, or, if the violation or misuse of public resources is within the jurisdiction of the inspector general, to the inspector general in accordance with section 121.46 of the Revised Code. In addition to that report, if the employee reasonably believes the violation or misuse is also a violation of Chapter 102., section 2921.42, or section 2921.43 of the Revised Code, the employee may report it to the appropriate ethics commission.

Here, Sommer's email to the OIG did not allege a criminal violation. Thus, under the express terms of the statute, he is not a whistleblower as defined by R.c. 124.341(A). Therefore, Sommer has failed to establish that the appellate court was bound to disregard the plain language of the statute and mechanically follow the findings of the administrative agency, and his

argument is without merit.

**Appellee's Proposition of Law No. 3: The statute offends no constitutional protections because it rationally advances the state interest in administering a system of whistleblower protection.**

Sommer's argument that the appellate court's decision is unconstitutional is a red herring. As this Court has noted, "statutes are presumed to be constitutional and that courts have a duty to liberally construe statutes in order to save them from constitutional infirmities. *Epply v. Tri-Valley Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 56, 2009-Ohio-1970, 908 N.E.2d 401, ¶ 12, citing *Desenco, Inc. v. Akron*, 84 Ohio St.3d 535, 538, 706 N.E.2d 323 (1999). R.C. 124.341(A) sets forth a number of different individuals to whom a whistleblower report can be made. Again, all the appellate court's decision did was recognize that the plain language of R.C. 124.341(A) only confers whistleblower protection upon state employees who make reports to the OIG when the alleged report involves a criminal matter. This alone is not proof that the statute creates two classifications of state employees. Sommer's only proof, is his own conjecture.

Even if Sommer could show that R.C. 124.341 creates separate classes of state employees, he fails to show that R.C. 124.341 is unconstitutional. "A state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 8, quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 55 L.Ed 369 (1911). Legislative enactments are "presumptively rationally related to legitimate and social economic goals." *McCrone*, at ¶ 30, quoting *State ex rel. Doersam v. Indus Comm.*, 40 Ohio St.3d 201, 203, 533 N.E.2d 321 (1988). Here, R.C. 124.341(A) sets forth other individuals to whom a state employee can report a non-criminal statutory violation and receive whistleblower protection. In

this regard, Sommer fails to show how the language in R.C. 124.341(A) is not rationally related to advancing the interest, as set forth by the appellate court in *Haddox*, of “[protecting] state employees who report violations or misuse from retaliation.” *Haddox* at ¶ 44.

However, as stated above, even if the language in R.C. 124.341(A), as it is currently drafted, was not rationally related to then the interest of protecting state employees who report non-criminal misconduct to the OIG from retaliation, then H.B. No. 426 and H.B. No. 439, which have been introduced before the General Assembly would cure this issue by providing whistleblower protection to state employees who report non-criminal conduct to the OIG. Thus, Sommer’s argument is off-target, and this Court should decline to entertain it.

**Appellee’s Proposition of Law No. 4: Even if Sommer was entitled to whistleblower protection under R.C. 124.341, BWC had a legitimate, non-retaliatory reason for reprimanding Sommer.**

Assuming that Sommer is entitled to whistleblower protection, Sommer falls short of proving that BWC did not have a legitimate, non-retaliatory reason for issuing him the written reprimand. Sommer essentially argues that, pursuant to R.C. 124.341(B) and (C), the only legitimate reason an employer can set forth for disciplining an employee in connection with filing a whistleblower report is when the employee purposely, knowingly, or recklessly reports false information. Moreover, Sommer claims that he did not report false information, so he cannot therefore be disciplined. Sommer’s argument, however, is off-target.

First, as both SPBR and the common pleas court found, Sommer was not issued a written reprimand because he engaged in protected activity. Rather, he was issued a written reprimand because he violated BWC’s work rules by creating the appearance that he was speaking on behalf of BWC when he was not, and he thereby compromised BWC’s ability to work with the

ICNC. Sommer used his work email address to contact the OIG about the ICNC, even though he was not acting on behalf of BWC. Moreover, the signature block in his email specifically identified him as an attorney with BWC and contained his work telephone number. Sommer's supervisor, determined that the fact Sommer had created the appearance as if he was acting on behalf of BWC when he was not, and in doing so compromised the ability of BWC's Executive Leadership Team to work with the members of the ICNC, was a violation of BWC's work rules. That justified a written reprimand.

Moreover, adopting Sommer's argument would cause R.C. 124.341 to conflict with R.C. 124.34, which specifically allows an employer to discipline an employee for "violation of any policy or work rule of the officer's or employee's appointing authority." As this Court has noted, statutory provisions of the revised code should be read to exist harmoniously. *Blair v. Bd. of Trs. Of Sugarcreek Twp.*, 132 Ohio St.3d 151, 2012-Ohio-2165, 970 N.E.2d 884, at ¶ 18. In addition, there is no language in R.C. 124.341 which prohibits an employer from taking corrective action against an employee for disobeying the employer's work rules, which is what happened here. Sommer earned a written reprimand because his decision to send a personal email from his work email address violated BWC's work rules. The decision to reprimand Sommer is thus consistent with R.C. 124.34. This is especially true here, where there is no evidence that Sommer was somehow prohibited or restricted from contacting the OIG about his concern using some method other than his work email address.<sup>2</sup> Sommer's argument is therefore without merit.

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<sup>2</sup> In fact, R.C. 121.46 requires the OIG to create a blank form to provide to individuals, free of charge, who wish to file a complaint with the OIG.

## CONCLUSION

For the foregoing reasons, BWC respectfully requests that this Court decline to accept jurisdiction over the above-captioned appeal.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing *Memorandum in Opposition to Jurisdiction of Defendant-Appellee Bureau of Workers' Compensation* was served by ordinary U.S. Mail, postage prepaid, upon Joseph C. Sommer, 5672 Great Hall Court, Columbus, Ohio, 43231, this 13<sup>th</sup> day of March, 2014.

  
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