ORIGINAL

IN THE SUPREME COURT OF OHIO

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

APPELLEE DONALD LEE'S
MERIT BRIEF

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I. STATEMENT OF THE CASE AND FACTS

Appellee ("Appellee"), Don Lee, was employed by the Village of Cardington as the Crew Chief from 2000 until his unlawful termination in 2009. His duties included supervising and overseeing all street maintenance work, sewer maintenance work, and the operation of the water treatment plant and waste water treatment plant ("WWTP"). Lee Affidavit, ¶2, attached to memorandum contra motion for summary judgment, Docket #53. He supervised nine or ten employees. Ralley, depo. at 12, Docket #52. He has also served as a Township Trustee for nearby Cardington Township since 1996. Lee Aff. ¶4. Part of his duties entailed supervision of the licensed operator of the waste water treatment plant. Lee Aff. ¶3.

The Appellant Village of Cardington would have this Court ignore Appellee Lee's affidavit testimony, attached to his memorandum contra Appellant Village of Cardington's motion for summary judgment. Throughout the course of this action, Appellant sought to rely solely on Appellee's deposition testimony taken and organized at its direction. Appellee's affidavit contains reliable, probative, and admissible evidence. Appellee's deposition testimony is incomplete. He testified on cross-examination in response to Appellant's questions. The affidavit tells the complete story in chronological order, is not inconsistent with deposition testimony, and provides a fuller, more comprehensive picture. In fact, at no point, either in the courts below, or in its merit brief does the Appellant Village even point out any contradiction between the affidavit and the deposition testimony. Reliance, therefore, solely on deposition testimony is misplaced. For example, Appellee's affidavit conclusively shows Appellee made a written report in full compliance with the prescriptions of the whistleblower statute. At a minimum Plaintiff's testimony presents a question of fact that can only be resolved by the jury, thereby making the trial court's award of summary judgment erroneous.

The nature of the environmental problems that Appellee reported are best placed in context with an understanding of the operation of the WWTP. Cardington uses two waste water pump stations located in the village to lift the raw sewage to allow it to flow at the force of gravity. When the water reaches the head of the WWTP, it is then pumped out of a well which is 22 feet deep. It then proceeds through a tank that has a grinder designed to shred plastic, fabric, and paper before it flows into the aeration tanks. The first aeration tank holds 120,000 gallons and contains bacteria and diffusers to pump oxygen into the tanks to feed the bacteria. The bacteria digests the solids in the effluent. Operators sample the effluent and a decision is made as to how long the material stays in tank one before moving on to tank two. Once the effluent is pumped into tank two, the bacteria continues to digest and break down the solids. Once again the effluent is sampled and then it is pumped on to tank three where the bacteria continues its work. Lee Aff. ¶3.

Once the process of tank three is completed the effluent is pumped on to clarifiers. Clarifiers are circular tanks containing a circulator which slowly moves around the tank stirring the material. As it is stirring, the heavier particles drop to the bottom of the tank. As each clarifier is sampled, the depth of the solid particles is measured. This sample is also spun in the laboratory which indicates the percentage of solid in the clarifier. Once the level reaches 17-21 percent solids, everything is pumped to the digester. The two digesters are 60,000 gallon tanks where the solids settle and the liquid goes to the top of the tank. At this point, the flow of liquid is stopped and it sits. While it sits, the older aggressive bacteria eat the good (friendly) bacteria. The clear fluid is removed from the tops of the tanks and it is recycled through the plant. Ultimately solids are all that is left and the digester tank is pumped out to the drying floor where the sludge is laid out to dry. Lee Aff. ¶3.

The drying floor is constructed with plastic perforated tiles with sand underneath, and then perforated pipe is under the sand in order to return what water was not removed to the head of the plant. The resulting dry material is known as sludge which is shoveled out to a storage area. The sludge is removed from storage approximately 2.5 times per year. Nearly 200,000 gallons of clear fluid are returned to the Whetstone Creek each day. This entire process takes about 30 days. Lee Aff. ¶3.

A. Environmental Lawbreaking Was Discovered.

The WWTP began to experience never before encountered problems. There was an immense amount of frothing of the water and foam double the normal height. Lee Aff. ¶5. Appellee Lee also began to notice that the WWTP was experiencing a problem with the bacteria used to treat the raw sewage dying; this could cause the foaming. This was occurring two times a year and was coinciding with the July and Christmas holiday shut downs of the Cardington Yutaka Technologies ("CYT") plant. Upon further investigation, it appeared the plant was receiving a toxic material in the waste water at the time of the CYT plant shutdowns. Lee Aff. ¶6. Ralley depo. at 16. The bacteria are the lifeblood of the sewage breakdown operation; various forms of bacteria "eat" the sewage. That it was dying was a very significant problem.

CYT is a manufacturer of car parts for Honda. CYT is the village's largest employer, employing between 600-800 people during the relevant time periods of the instant case. Ralley depo. at 17; Wise depo. at 8; Docket #50.

B. Appellee Reported The Problem To The EPA, Requested Assistance, And Started Getting Pushback From The Village Administrator.

Appellee was in regular contact with the EPA to try to identify and rectify the problems observed in the WWTP. Mike Sapp was the Ohio EPA representative assigned to the Village of Cardington district. Lee Aff. ¶7; Ralley depo. at 25. By 2007, the problems had become worse.

The sludge which is the by product or final product of the WWTP process was contaminated and could no longer be used for agricultural purposes. Appellee had a permit with the EPA which permitted the Village to haul the sludge to his farm where he spread it for use as fertilizer. Lee Aff. ¶8.

Once Appellee determined that the sludge was contaminated and that no plant life would grow in it, he informed the Village Administrator, Dan Ralley, that he could no longer accept the sludge for his farm so the Village would have to find an alternative dumping site, most likely a landfill which would cost additional money. Instead, Mr. Ralley wanted to ignore the problem and insisted that Appellee try to find another unsuspecting farmer who would be willing to take the sludge. Appellee refused, much to the chagrin of Mr. Ralley, and ultimately the sludge was taken to a landfill. This problem which Mr. Ralley would have preferred to ignore cost additional money. Lee Aff. ¶9; Lee depo. at 36, Docket #36; Ralley depo. at 39. The cost was approximately $7,000-$7,500 for each trip to the landfill. Ralley depo. at 45.

The WWTP operator, Mike Chapman, and Appellee requested help from the EPA in resolving the problem. Mike Sapp and two other EPA employees came to the plant, spent two days evaluating the operation of the plant, procedures, and processes and declared that he "wished all of our wastewater treatment plants were being run with this type of operation." In other words, there were no problems with the procedures being utilized by the Village of Cardington WWTP employees. Lee Aff. ¶10; Ralley depo. at 40.

Next, the EPA and village officials visited other commercial or industrial sites to eliminate those businesses as sources of the problem with the contaminant. Ultimately, by late 2007, it appeared that CYT was placing the contaminant into the waste water which was finding its way into the WWTP. For CYT to place any kind of industrial waste product in the water, it

was an EPA violation. Lee Aff. ¶11. It also needed a permit for any type of pretreatment or disposal for waste water, which it did not have. Ralley depo. at 31. Appellee informed Mr. Ralley of this situation. Lee Aff. ¶11.

In order to try to ascertain whether the problem material was coming from the CYT plant and its nature, Appellee and his subordinates drew samples from a sewer line near CYT. They drew samples on four different occasions. On two of those sampling visits, they were spotted by CYT employees and pumps in the plant were shut down so their efforts at obtaining samples failed. However, on another occasion, Mr. Barlow, of the federal EPA, obtained a successful sample which was sent to a lab in Colorado. The lab identified the compound as glycol which is a product used by CYT in its leak inspection tanks. Lee Aff. ¶12.

Appellee, Mike Sapp, Mike Chapman, and Jason Hursey (WWTP plant employee) made an unannounced visit to CYT. About three months later, federal EPA officials decided on another follow-up unannounced visit to the CYT plant in April, 2008. Unfortunately, Dan Ralley caused CYT management to become aware about the impending visit so much of the purpose of the investigatory inspection was thwarted. During the visits, large tanks were observed in which CYT submerged automotive parts, and blew air into those parts to check for leaks. The tanks contained industrial chemicals including glycol. Lee Aff. ¶13; Ralley depo. at 34.

Subsequently, state EPA official Mike Sapp and federal EPA official Dave Barlow told the Appellee that they did not trust Mr. Ralley and instructed Appellee not to share EPA plans for their investigation with Mr. Ralley. Lee Aff. ¶14.

C. Appellee Reported Problems To Mr. Ralley; He's Uncooperative.

Appellee reported problems with the WWTP as a result of the illegal dumping to Mr. Ralley on numerous occasions. Often times he was uncooperative or resisted Appellee's efforts to fully inform him of the problems. Mr. Ralley threatened Mike Chapman and the Appellee by telling them that if employees of CYT lost their jobs as a result of this unauthorized industrial dumping, that so would they. Lee Aff. ¶15.

Mr. Ralley also discouraged Appellee's efforts to present the problems with the WWTP to the village council. At times he threatened Appellee's job if he went over his head and discussed the problems with members of village council. At one time in late 2008 or early 2009, he said he would let Mr. Chapman and the Appellee alternate months attending meetings and reporting to council but then he changed his mind and would not permit it. Although council was generally aware of some of the problems at the plant, Village council member Randal Fox testified that Mr. Ralley never mentioned to council that CYT was the source of the discharge. Fox depo. at 30, Docket #50.

Another example of Mr. Ralley's obstructionist behavior can be found in the ordering of a sampling device. Mr. Chapman, Mr. Ralley, and Appellee agreed that the village needed to purchase a sampling machine to be placed in the well at CYT to help identify the source and nature of the problem. Mr. Chapman and Appellee found a device that would physically fit in the well and accomplish the objectives. Unfortunately, Mr. Ralley ordered a completely different machine along with a training course, but the machine would not fit in the well. Appellee suggested he and Mr. Chapman complete the training process because it might instruct them as to how they could make the instrument fit into the well. They were not permitted to do the training nor was the equipment ever exchanged. Lee Aff. ¶17.

D. Appellee Reported Violations By The Village And CYT To Village Council.

On September 15, 2008 Appellee was permitted to attend the village council meeting to inform them of WWTP pump and other problems. The contaminant was causing a deterioration in the propellers of the pumps. He informed the council that the Village had a material coming into the plant that was killing the WWTP bacteria and as a result the village was also sending toxic water downstream. In addition glycol was being returned to the Whetstone Creek. Appellee explained that glycol is not to be put into waste water treatment systems, because if it is not removed, and therefore if it is going back into the Whetstone Creek, it will be in the drinking water that is used downstream by half a million people. This was an EPA violation by the village because the chemical entering the drinking water had been identified as toxic. Also since EPA was then aware of glycol in the WWTP stream, Appellee told the council that the village could have trouble renewing their EPA permit which would cause the EPA to take control of operation of the plant. The glycol container label even instructs that it is not to be placed in a waste water system. To the Appellee's surprise, no one on council asked any questions, requested further elaboration, nor asked for nor indicated any sort of follow up activity was necessary based upon what he had told them. Lee Aff. ¶18.

Despite their silence at the council meeting, village council members knew and were aware that the village's WWTP permit, set forth the appropriate limits for materials, chemicals, and compounds discharged into the Whetstone Creek. They knew that if the levels of discharges exceeded the specifications of the permit, that the village could be liable for EPA violations. Garner depo. at 27; Fox depo. at 27; Graham depo. at 30, 31, Docket #50.

Appellee further indicated to village council and Mr. Ralley that he did not agree with some aspects of the engineering reports and estimates to repair the plant. He indicated that some

of the items were a waste of taxpayer money and could be accomplished much more cheaply. Mr. Ralley wanted to completely turn the solution to the problems with the WWTP over to an engineering firm which was proposing a project that cost at least $800,000. Appellee suggested to council that the village could work in steps to accomplish the repairs one at a time which would satisfy the EPA, save taxpayer money, and achieve a better product in the end. Appellee suggested that the village not bury itself in debt and that there were much cheaper alternatives to the engineering proposals. For example, Mr. Chapman and Appellee believed that a change in the grinding and sorting process at the head of the plant could improve the flow and that could be done for just $100,000.00. In addition, the engineering firm wanted over $100,000.00 to install equipment to deal with phosphorous removal. Appellee and Mr. Chapman developed a chemical process which removed the phosphorous with a cost to the village of less than $10,000.00. Mr. Ralley was reluctant to report this achievement to the council. Lee Aff. ¶19.

Another example is Appellee disagreed with an engineering proposal to increase the diameter of the inflow pipe to the plant because it failed to account for the smaller diameter pipe that would have still been encased in concrete inside the plant, and it failed to account for the fact that the sewage would sit in the larger pipe without starting treatment which would also frustrate the specially designed bacteria in the plant. Appellee Lee also suggested a well-known reservoir method could have been used to control the inflow problems and to deal with excess storm water which causes overflows. Lee Aff. ¶19.

Dan Ralley admitted that Appellee talked to him a lot regarding the water problems in the WWTP. Ralley depo. at 80. Mr. Lee also mentioned that the village should be dealing less with engineers and more with maintaining and repairing the plant. *Id.* at 115. He characterized it as tension between what the engineers proposed and a simpler solution. *Id.* at 56. Appellee said

some of the problems could be resolved in a cheaper fashion. *Id.* Mr. Ralley stated that Appellee had told him how very concerned he was about the quality of the water going into the Whetstone Creek. Ralley depo. at 70.

Members of village council admitted they were aware of the disagreements between Appellee Lee and Mr. Ralley related to plant repair issues. Council member Fox was aware that Mr. Chapman and Appellee had solved part of the problem in the WWTP in a different way than the engineers proposed. He further knew that Appellee had evaluated the engineering figures and thought they were inflated. In fact Mr. Fox thought another engineering firm should be consulted regarding an estimate. Fox depo. at 47-52. Council member Garner admitted he was aware that Appellee disagreed with some of the budgetary numbers related to the WWTP proposed by Mr. Ralley which were based upon the engineering firm's estimates. Similarly, he remembered that Don Lee expressed a number of ideas that would work to fix the WWTP and that Mr. Ralley disagreed with those notions. Garner depo. at 18-20. Finally, Ms. Graham testified that Don Lee was upset about the disruption that had been caused in the publicly owned WWTP and that someone should pay. Graham depo. at 41.

Appellee reported other violations of the law involving CYT to Mr. Ralley. The village of Cardington has an ordinance that limits any one user of water to a total of five percent of the total average of the village's water production. Appellee informed Mr. Ralley that CYT was probably exceeding the limits established by the ordinance, and that this would have been another way to try to limit the quantity of glycol being placed into the WWTP. He urged Mr. Ralley to enforce the ordinance but no further action was taken. Lee Aff. ¶20. Ralley depo. at 116.

On another occasion, Appellee informed Mr. Ralley that he suspected that CYT was using a separate well as a source of fresh water. This also violates the village ordinances because it allows for waste water to be placed into the sewer system without CYT paying for the sewer service. This is true because the sewer bills are generated based upon the amount of metered fresh water consumed by the user. Lee Aff. ¶21. Ralley depo. at 52.

E. Appellee's Written Report Summarized The EPA Problems.

Shortly before Appellee's termination, at the suggestion of Mr. Barlow, Appellee provided a written supervisor's report to Mr. Ralley. Mr. Barlow thought that village council could use the report as a tool to seek reimbursement from CYT. To Appellee's knowledge this written report was never provided to council. This document was a summary of Appellee's analysis of his observations of the problems in the WWTP. It also set forth the specific equipment failures/damage that had occurred as a result of the dying bacteria caused by the illegal placement of glycol in the waste water. Appellee characterized the problem as the village had lost part of the life of its plant. For example the pumps were damaged by this glycol because it changed the consistency of the sewage material pumped. Appellee further outlined what equipment needed to be repaired/replaced in order to keep the village operating within the parameters of its permit which would alleviate present and prevent future EPA violations. Lee Aff. ¶22.

F. Appellee's Termination Was Retaliatory.

In late April 27, 2009, Mr. Ralley called the Appellee and told him he needed to have a private meeting. Appellee agreed to meet later at Mr. Lee's office at the water treatment plant. Mr. Ralley arrived accompanied by village council member Fox. Mr. Ralley stated he had one of the most difficult things to do that he ever had done. He told the Appellee he was being

placed on two weeks administrative paid leave, and then he was to resign his employment. When Appellee asked why, Mr. Ralley responded that he did not have to give a reason. Appellee then inquired of Mr. Fox who responded that he did not have a clue what Mr. Ralley was doing or why. Mr. Ralley told the Appellee that if he did not resign, he would fire him. Lee Aff. ¶23. Appellee did not resign, was placed on leave, and was terminated approximately two months later.

At no time was Appellee ever warned that his job performance was deficient in any way. Ralley depo. at 98. He was not criticized nor informed that there were concerns with projects not being done or completed on time. He was not counseled related to his job performance. Ralley depo. at 87. No one ever confronted him nor accused him of using village vehicles for personal business. Finally, at no time was Plaintiff ever warned that his job was in jeopardy. He was never disciplined. Lee Aff. ¶24. Dan Ralley admitted he had no notes or documentation of any problems; no paperwork was submitted. Ralley depo. at 88.

Appellant moved for summary judgment in the trial court below. Appellant has never argued, neither before the trial court nor in the court of appeals, that its articulated reasons for the Appellee's termination were the basis for or entitled it to summary judgment. In fact, the Village has never even cited or set forth those facts previously. For Appellant to do so now, presents matters not argued nor briefed below and should not be considered as part of the instant appellate review. It is well settled that a litigant's failure to raise an issue before the trial court waives the litigant's right to raise that issue on appeal. *Hudson v. P.I.E. Mutual Insurance Co.*, 10th Dist. Franklin No. 10AP-480, 2011-Ohio-908; *State ex rel. Zollner v. Industrial Comm.*, 66 Ohio St.3d 276, 278, 611 N.E.2d 830 (1993).

All of the village council members who were deposed testified that they expected that before any village employee would be terminated that the employee receive counseling about the specific deficiencies in their job performance. They expected that the employee be warned if his job is in jeopardy so that that he would have the opportunity to correct it. Graham depo. at 20; Wise depo. at 13; Fox depo. at 23; Garner depo. at 12. Although they voted on the matter, all members of council relied upon the recommendation of Mr. Ralley regarding the reasons for the termination. Graham depo. at 16; Wise depo. at 31; Fox depo. at 19; Garner depo. at 37. No documentation of any problems was presented to council prior to the decision to terminate, Graham depo. at 17. No one asked Mr. Ralley if the Plaintiff had been counseled or warned about his performance despite counsel's expectation that that was the process to be followed. Fox depo. at 23.

That Appellee was the victim of retaliation is evident from the wide variety of reasons given for his termination by various members of the village council. The reasons supposedly conveyed to them by Mr. Ralley are not consistent. Ms. Graham said Appellee was terminated for taking an extra week of vacation and not completing jobs. Graham depo. at 14. While Ms. Wise said the reason was a fire hydrant job that took too long, problems with the Gilead ditch at the cemetery, a vehicle which had been used for personal business, and a broken sidewalk at the Methodist Church. Wise depo. at 29. Ms. Garner, on the other hand, cited personal use of a white van months before, the sidewalk problem at the church, and the extra week of vacation. Garner depo. at 37-45.

Identifying and working to correct the problems in the WWTP was incredibly time consuming. This problem caused Appellee to spend a larger amount of time at the WWTP than is ordinarily contemplated by his job description. Mr. Ralley was aware of the burden on

Appellee's time created by this problem and never instructed him to spend less time dealing with the WWTP issues. Lee Aff. ¶25; Fox depo. at 69.

Appellant's reasons, articulated after the fact, are pretext. Mr. Ralley either knew or an investigation would have shown that Plaintiff was instructed by Mr. Ralley to repair a problem with water pooling in the parking spots near the front of the Methodist Church. His crew discovered that the existing drain tiles were cracked and that they needed a standing pipe for a drain in the depression of the lot. The cracked tiles were more extensive so they kept digging closer and closer to the church than originally planned. Unfortunately, one section of sidewalk was damaged during this process which they repaired. There was no existing problem with the sidewalk so the Church received no additional benefit. One of Appellee's subordinates, Cheyenne Martinez disagreed with some of the solutions used to fix this problem, and may have said something about it. Lee Aff. ¶27.

Appellee did instruct that one drain box (drop box) be left higher on the Cemetery Drain project. The reason for this was because the drop box was off to the side of the road, and he left it a little higher so that when the road was resurfaced, which was planned, the drain would line up with the new grade. Once again Mr. Martinez expressed some disagreement with this strategy. Appellee saved the village a considerable amount of money over the amount estimated by an engineering firm on this project. Lee Aff. ¶28.

Appellee never used a village van for any personal use or purpose. He used the van around the village for carrying supplies. He did take the van to buy weed control products for the village because he had a license for herbicide use due to his farm. On the occasion which was resurrected months later, the first store, Farmers' Coop, was out of the Roundup so Appellee proceeded to go to Crop Production Services in Edison to get the product. On another occasion

Appellee was driving the van and hit a large tree branch which broke the oil line which ruined the engine. Even though it was no fault of Appellee, he nevertheless felt responsible, and told Mr. Ralley that he paid the cost for a new engine for the van. Lee Aff. ¶29.

The only Village equipment which was at Appellee's farm was the manure spreader which the village knew and agreed he could store there, and which he was allowed to use to spread the sludge and any other manure product. It had to be attached to his tractor. Lee Aff. ¶30.

In February 2009, Appellee used his vacation time for mission work in Haiti following the earthquake. Appellee had been there for 2 weeks which was preapproved. It was difficult to get flights home so when it became apparent that Appellee needed an additional week in order to get home and to finish his work, he sent an e-mail to Mr. Ralley informing him of the situation. Mr. Ralley did not respond that this was a problem or was denied. Appellee had the vacation time accrued. Lee Aff. ¶30.

If this vacation or any other issue supposedly noted while Appellee was on vacation really had been a problem, Appellee Lee would have been terminated when he first reported back to work. He was not.

II. ARGUMENT

APPELLEE'S RESPONSE TO PROPOSITION OF LAW NO. 1

R.C. §4113.52(A) only applies to employee reports of criminal offenses or violations that are likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony, which are allegedly committed by the employer itself or a fellow employee, and which the employer can correct within 24 hours, not to third parties outside the employment relationship.

A. Appellee Satisfied The Elements For A Claim Pursuant To O.R.C. §4113.52(A)(1).

1. Plaintiff Reported Criminal Activity.

Throughout the course of this litigation Appellant adopted and abandoned several overly restrictive interpretations of the whistleblower statute, O.R.C. §4113.52(A). For example, at one time Appellant incorrectly argued that Appellee was not entitled to protection because he never made a report to an outside agency pursuant to O.R.C. §4113.52(A)(1)(a). While belied by the actual facts of this case, such an interpretation is wrong. Appellant also incorrectly claimed and mentions again in this Court that the reported violation can only be something that can be corrected within twenty four hours.

Now for the first time on the appeal to this Court, Appellant claims that the Fifth District Court of Appeals applied the whistleblower statute to criminal actions by third parties which the employer either failed to address, and or did not have the ability to address. Such an assertion completely mischaracterizes and/or ignores much of the evidence in this action. While Appellee contends that under certain circumstances that the statute could be so applied, and that his employer had authority to rectify his complaints related to Cardington Yutaka Technologies, Appellee primarily alleged and argued that he was discharged in retaliation for his reports of criminal activity by the **Village of Cardington** rather than Cardington Yutaka Technologies (CYT). The Court of Appeals so held.

Contrary to the assertions of the Appellant, the court of appeals found that Appellee repeatedly complained about conduct by his employer that was a criminal offense and a violation of state and federal law that was likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety. After Appellee and the EPA ultimately discovered the type of toxic chemical and its source, Appellee reported to his employer that CYT was discharging glycol into the WWTP. Appellee indicated that not only was the glycol not being filtered out of

the water and was being returned to the Whetstone Creek **by the village** where it would become a hazard to the drinking water for all users situated below the plant (a criminal violation by the village), but also the glycol was upsetting the operation of the WWTP. The glycol upset the bacteria balance in the plant causing it to die which changed the consistency of the effluent material which in turn damaged the pumps and other equipment. This put the proper operation of the WWTP at risk and not only jeopardized the village's EPA permit but threatened to and/or did cause **the village to violate its permit** which exposed the **village and/or its officials** to criminal liability.

In order to make out a prima facie case of whistleblower retaliation, Plaintiff must show that 1) he engaged in activity which would bring him under the protection of the statute; 2) he was subject to an adverse employment action; and 3) there was a causal link between the protected activity and the adverse employment action. *Dargart v. Ohio Department of Transportation*, 2005 Ohio 1808, P24 (Ct. Claims 2005). If Plaintiff establishes a prima facie case, the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the actions taken. Should the employer articulate such a reason, then the Plaintiff has the burden to come forward with some evidence to demonstrate that the employer's stated reason was, in fact, a pretext for retaliation. *Id.*, P25. O.R.C. §4113.52(A)(1)(a) provides:

> If an employee becomes aware in the course of the employee's employment of a violation of any state or federal statute or any ordinance or regulation of a political subdivision that the employee's employer has authority to correct, and the employee reasonably believes that the violation is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety, a felony, or an improper solicitation for a contribution, the employee orally shall notify the employee's supervisor or other responsible officer of the employee's employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation. If the employer does not correct the violation or make a reasonable and good faith effort to correct the violation within twenty-four hours after the oral notification or the receipt of the report, whichever is earlier, the

> employee may file a written report that provides sufficient detail to identify and describe the violation with the prosecuting authority of the county or municipal corporation where the violation occurred, with a peace officer, with the inspector general if the violation is within the inspector general's jurisdiction, or with any other appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which the employer is engaged.

Appellee repeatedly complained about conduct that was a criminal offense and a violation of state, federal, and local ordinances that was likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety. Appellee disclosed that glycol was entering the WWTP. Appellee indicated that not only was the glycol not being filtered out of the water and was being returned to the Whetstone Creek **by the village** where it would become an imminent hazard to the drinking water for all users situated below the plant, but also the glycol was upsetting the operation of the WWTP. As stated above, this jeopardized the village's permit and threatened to cause **the village to violate its permit** which exposed the **village and/or its officials** to criminal liability.

The village of Cardington's permit was governed by O.R.C. Chapters 3745, and 6111 and specifically the provisions of O.R.C. §6111.60 and O.A.C. §§3745-33 and/or 3745-38. The permit issued by the EPA specifies the levels of the various compounds, chemicals, or elements which are permitted to be in the water that is returned to the state's water supply following treatment. If those levels are exceeding the mandates of the permit, of course, the village is violating the law.

O.R.C. §6111.04(C) prohibits a permit holder from discharging sewage in excess of the permissive discharges authorized under an existing permit into the waters of the state without permission from the director. Section 6111.60 governs the issuance of the village's WWTP NPDES permit. Section 6111.99 states that violators of section 6111.04 are subject to a $25,000.00 fine and/or imprisonment for up to one year. Furthermore, O.R.C. §2927.24(B)(1)

makes it unlawful to knowingly place a hazardous chemical or harmful substance in a public water supply. This statute provides for criminal penalties. So once the Appellant Village became aware of the presence of glycol in the water and the fact that it was altering the processing of the effluent and the purity of the water being returned to the Whetstone Creek it had a duty to correct it, or there was a risk of criminal sanctions. All deposed village council members admitted that it was illegal to discharge water with chemical content exceeding the limits set by the EPA permit.

The defense outlined in the statute and relied upon by the Appellant does not apply. O.R.C. §2927.24(B)(1) carves out an exception only if the contaminant is disposed of as waste into a household drain, and subsequently into the waste water system. In the instant matter, the contaminants were going into the drinking water. The Village was placing water that was not treated in accordance with its permit, contained improper substances on account of the manner in which the glycol destroyed the system, and which contained the known contaminant, glycol, into the creek (not a drain) which flowed downstream into waters which were used for drinking by the city of Columbus among other entities. It is hard to imagine a more imminent threat to the health and safety of the public. It was a criminal violation.

The evidence therefore shows that Appellee reported activity that he reasonably believed to be criminal in nature. Appellee need not prove that the activity was actually criminal. All that is necessary is that he formulate a reasonable good faith belief that he is trying to rectify criminal matters. Whether or not Appellee's beliefs are reasonable, if at issue, are questions of fact that must be resolved by the jury.

2. Appellee Made A Written Report.

Appellee made a written report as required by the statute. In addition to his oral reports to Mr. Ralley and the village council, Appellee made a written report to Mr. Ralley, his direct supervisor. Appellee characterized this as a supervisor's report. It was done at the suggestion of Mr. Barlow of the federal EPA. In the report Appellee outlined not only damaged WWTP equipment, but he set forth the problem of the glycol being placed into the waste water system. He described the equipment failures which were occurring as a result of the bacteria dying. He said the village "had lost part of the life of our plant." He told the village what equipment needed to be replaced in order to keep the WWTP operating within the parameters of its EPA permit in order to prevent violations. The report summarized Plaintiff's observations of all the illegal problems resulting from the glycol entering and exiting the WWTP. Affidavit of Lee, ¶22.

Appellee did report the alleged criminal violations to the village council and to Dan Ralley, the village administrator. Appellant's statements to the contrary are incorrect. Even the portion of the Court of Appeals decision quoted by the Appellant reveals Appellee was complaining of criminal conduct. In paragraph 7 the court acknowledges: "[h]e informed the council the Village had a material coming into the plant killing the bacteria, and as a result **toxic water was potentially being sent down stream.**" (emphasis added). This is a criminal violation as the village was violating both its permit provisions, and O.R.C. §2927.24(B)(1) which makes it unlawful to knowingly place a hazardous chemical or harmful substance in a public water supply. The evidence in this action reveals the written report to Mr. Ralley also referred to criminal matters as required by the statute. Appellant erroneously believes that Appellee's deposition indicates to the contrary. Throughout this action, Appellant relied on

Appellee's deposition testimony which was incomplete, disjointed, and out of chronological order. Appellant would have this Court ignore Appellee's affidavit testimony which is not contradicted by his deposition transcript. Moreover, Appellant consistently ignores additional testimony by Appellee toward the end of his deposition where Appellee stated that his supervisor's report contained notification of EPA violations. Lee depo. at 217. Appellee stated that rectifying the problems with the equipment and the failures caused by dying bacteria was all part of working with the EPA. Lee depo. at 218, 220.

3. Appellee Reported A Threat Of Imminent Harm.

Appellee's complaints and report involved a threat of imminent risk of physical harm to persons or a hazard to public health or safety. It is hard to imagine a more imminent situation than that reported by Appellee. Appellee informed Mr. Ralley that glycol was both entering the plant and not being removed via the treatment process. It therefore was exiting the plant and posed a threat to the drinking water sources of downstream users. The same was true for the treated water. Appellee reported his concerns that the glycol might alter the treatment process to the extent that the village would violate the mandates of its EPA permit meaning the sewage was not being properly treated posing an obvious imminent risk of harm to the public.

Whether or not Mr. Ralley ever provided the report to village council is immaterial to the case at bar. The evidence is uncontradicted that Mr. Ralley was Appellee's direct supervisor and that he recommended Plaintiff's termination to the council.

Consequently there can be no question that Appellant was complaining of criminal conduct by the Village. The Court of Appeals found that Appellee was complaining of violations of the law by the Village. *Lee v. Cardington*, 5th Dist. Morrow No. 12CA0017, 2013-Ohio-3108 ¶¶21-25. In only one sentence does the Court also state "...we find the Village has

the authority to correct the alleged illegal activity of CYT, even if the Village was not directly involved in the criminal activity" which is also a correct reading of the statute. *Id.,* ¶26. O.R.C. §4113.52(A) specifically provides for these types of reports of criminal activity stating that: "[i]f an employee becomes aware in the course of the employee's employment of a violation of any state or federal statute . . . that the employee's **employer has authority to correct** . . ." then the employee can report it to the employer. (emphasis added). As stated, in this situation the Village did have enforcement powers that it could have utilized. Plaintiff also is entitled to present evidence of his attempts to have the Village take action against CYT and retaliation on account of those efforts.

Appellant misreads the statute placing the foundation of its argument on the notion the Village supposedly had a mandatory statutory duty to take corrective action within 24 hours. The village bootstraps onto that notion the argument that the prosecutor had discretion and normally could not decide whether or not to pursue prosecution that quickly, and the prosecutor's decision to defer to the Ohio EPA and Federal EPA. The problem with this argument is that not only is evidence related to the prosecutor not in the record, nor referenced, raised or even so much as mentioned in the courts below, it is not dispositive since Appellee presented ample evidence of wrongdoing by his employer. Appellee recalls no statement by the Court of Appeals that this case involves an issue of first impression. The opinion is silent. Appellant is grasping at straws to try to make it appear this is an unprecedented case. While the facts of every case are unique, the whistleblower issues at bar are not.

The whistleblower statute is designed to protect individuals who report illegal activity by their employer or conduct that the employer has the ability to correct. Appellant implies that it should not be liable if it cannot correct the problem within twenty four hours. This is an overly

restrictive reading of the statute. Clearly the employer can respond or indicate how it intends to address the problem within the twenty four period. In *Jamison v. American Showa,* 5th Dist. Delaware No. 99 CAE -03-014, 1999 Ohio App. LEXIS 6212 (Dec. 16, 1999), in his written report to his employer, the employee indicated he expected to hear an answer in five days. Nowhere did the Court rule that the five day request rendered the protections of the statute unavailing to Johnson.

Instead, if the employer chooses not to respond to the problem within twenty four hours, the employee can proceed to report the criminal activity to an outside entity. The statute states that the only event that must occur within twenty four hours is the employer reporting back to the employee. O.R.C. §4113.52(b) states that the employer within twenty four hours after the written report was received "shall notify the employee, in writing, of any effort of the employer to correct the alleged violation or hazard or of the absence of the alleged violation or hazard". Thus the problem itself need not be something that can be, or has to be corrected within twenty four hours. The employer merely has to state what action it intends to take.

Even then the employer is not necessarily liable. Appellant omits that the employer faces no liability until it takes some form of retaliatory action based upon the whistleblowing. So long as the employer does not retaliate against the employee, whether or not the employer or its prosecutor took action within twenty four hours is of no actionable concern. Finally, Appellant's reference to the prosecutor makes no sense. Appellee was complaining about criminal activity by the village. The village was not going to refer itself for prosecution.

The Court of Appeals also correctly recognized that the Appellant Village's reliance on the hearsay statements made by Mr. Barlow of the federal EPA are not dispositive. Mr. Barlow merely commented that the procedures being used in the plant back in 2007, before the discovery

of the nature of the contaminant (glycol), were proper and were not causing the malfunctions. In other words, Village employees were not making any mistakes and were carrying out their duties correctly. That did not mean the village was not violating the law, even though they knew there was an unknown contaminant causing major problems. However once the glycol was later identified, and the EPA and Appellee Lee realized that the chemical was not being removed from the water returned to the Whetstone Creek, and that the chemical was altering the levels of various other substances present in the "clean" water returned to the creek, environmental criminal violations which the Village had the duty and ability to correct were confirmed. Regardless of whether the EPA made any threats, Appellee was pointing out that the village was violating the terms of its permit, which could lead not only to criminal penalties but put the permit in jeopardy as well.

B. Appellee Has A Whistleblower Claim Pursuant To O.R.C. §4113.52(A)(2) Which Does Not Require Appellee To File A Report With His Employer Related To Environmental Illegal Conduct.

The evidence is also uncontradicted that Plaintiff reported his concerns with CYT and the WWTP to Ohio and federal EPA officials and was cooperating with those agencies. In cases involving criminal violations of air and water pollution laws, there is no need to file an initial report with the employer before reporting the conduct to enforcement authorities. The report to the agency need not be in writing either. Oral disclosures provide for protection under the statute and the employer may not retaliate against the employee on account of those direct oral reports.

O.R.C. §4113.52(A)(2) provides:

> (2) If an employee becomes aware in the course of the employee's employment of a violation of chapter 3704., 3734., 6109., or 6111. of the Revised Code that is a criminal offense, the employee directly may notify, either orally or in writing, any appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which the employer is engaged.

O.R.C. §6111.04(C) prohibits a permit holder from discharging sewage in excess of the permissive discharges authorized under an existing permit into the waters of the state without permission from the director. Section 6111.60 governs the issuance of the village's WWTP NPDES permit. Finally, section 6111.99 states that violators of section 6111.04 are subject to a $25,000.00 fine and/or imprisonment for up to one year.

Thus, regardless of whether Plaintiff filed a written report with his employer, waited twenty four hours, or filed a written report with enforcement authorities, Plaintiff's conduct of verbally setting forth the water pollution violations (which were a crime) to the Ohio and Federal EPA constituted protected whistleblower activity and the village could not subject Plaintiff to a retaliatory discharge. O.R.C. §4113.52(A)(2).

The Appellant Village is incorrect when it states that Appellee did not report his concerns about the problems with the operation of the Waste Water Treatment Plant to the EPA. As paragraphs 7, 10, 11, 13, and 18 of Appellee's affidavit describe, Appellee was in constant contact with Mike Sapp of the Ohio EPA. Mr. Sapp was often at the plant. Appellee wrote his report to Mr. Ralley at the urging of Mr. Barlow of the federal EPA. ¶22, affidavit of Appellee. So Appellee had complained to Mr. Barlow as well.

Appellant devotes almost five pages of its brief to refuting a whistleblower claim related to the practice of delivering sludge to Appellee's farm. This appears to be a red herring designed to divert attention from Appellee's arguments, especially since Appellee made it clear in his briefs below that this was not a separate claim. At no point did Appellee argue that the situation with the sludge was a separate whistleblower claim. Instead, Appellee cited the evidence related to Mr. Ralley's initial insistence that the sludge be delivered to Appellee's farm despite its contamination, or to some other unsuspecting farmer, because it showed his animus, disregard

for, and/or indifference to environmental laws. This was but one piece in a long list of evidence cited in Appellee's brief showing Mr. Ralley's animus in support of the entire whistleblower claim.

C. Appellant Confuses The Issues With Evidence In The Record Related To The Broader Wrongful Termination In Violation of Public Policy Tort Claim.

As this Court may recall, Appellee originally brought this action including a tort claim for wrongful termination in violation of public policy. This claim was much broader than the whistleblower claim, and included Appellee's efforts to uncover Cardington Yutaka Technologies as the wrongdoer. Since the Fifth District Court of Appeals affirmed the dismissal of the wrongful termination claim, and this Court declined to accept jurisdiction related to the claim, some of the now historical evidence developed in this action related more to the wrongful termination claim than the whistleblower claim. Nevertheless, Appellant persists in citing to this evidence to confuse and obfuscate the whistleblower issues.

The illegal environmental violations occurred over a several year period. Appellant confuses and compresses together at least four separate overlapping sets of events that drew CYT into this action while ignoring the ultimate effect it had on the Village and how it related to violations of EPA law by the Village. First, Appellee, the village, and the EPA needed to identify what chemical was invading the WWTP, and its origin in order to address and rectify the problems that were occurring within the WWTP, and correct the problems in the water being returned to the Whetstone Creek. CYT was a logical suspect so much of the testing and investigation focused on it. Ultimately, it was concluded that CYT was the culprit dumping glycol into the waste water system. Second, Appellee believed that the village and Dan Ralley were shielding CYT for obvious economic reasons. If the problems in the plant were acknowledged and addressed, it could ultimately be an admission that CYT was involved in

illegal environmental dumping. It was a large local employer and the Village stood to be damaged economically. Third, Appellee was encouraging the village to use its enforcement powers with its sewer and water ordinances to curb CYT's practices which might ameliorate, at least to some degree, the problems that were occurring in the WWTP. The employer had the ability to correct these violations, so it is covered by the Whistleblower Statute. Fourth, and most importantly, Appellee was making complaints and reports about the Village's independent violations protected by the Whistleblower Statute which is the primary focus of the arguments above. Appellee was complaining about the problems with the permit and the impure water containing glycol which was being returned to the Whetstone Creek, all of which were potential violations by the Village, not CYT.

Thus the Appellant village would have the entire focus of Appellee's complaints/reports be on CYT, which is not what the evidence showed.

III. CONCLUSION

For the foregoing reasons, Appellee respectfully requests that the decision of the Fifth District Court of Appeals be affirmed.

Respectfully submitted,

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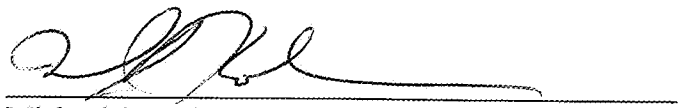
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document has been served upon John D. Latchney, O'Toole, Mclaughlin, Dooley & Pecora, CO., L.P.A., 5455 Detroit Road, Sheffield Village, Ohio 44054, *Attorney for Defendant Village of Cardington,* via regular United States Mail, postage prepaid, this 29th day of April, 2014.



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