

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 VILLAGE OF CARDINGTON'S REPLY BRIEF

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ARGUMENT

Proposition of Law No. I:

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.

Introduction

Lee's Complaint is telling for what it doesn't allege. There is nothing in the Complaint about Lee alleging that the Village was violating an environmental statute or engaging in criminal activity. There is nothing in the Complaint that Lee advised the Village that its wastewater treatment plant permits were in jeopardy. There is nothing in the Complaint about Lee advising the Village that he was concerned about the pollution of Whetstone Creek. Such claims were only raised after Lee had been deposed and faced a motion for summary judgment. Was this deliberate sandbagging or merely a *post hoc* attempt to resurrect a dying lawsuit? Either way, the Village should not be liable to Lee under the whistleblower statute for actions that were committed by a third party—Cardington Yutaka Technologies—especially considering that Lee failed to comply with the whistleblower statute.

The language utilized by the Ohio General Assembly establishes that it only applies to employer and employee conduct, not those of third parties.

Generally, R.C. § 4113.52 “establishes guidelines by which an employee can bring to the attention of the employer or appropriate authorities *illegal activity by either the employer or a co-employee* without being discharged.” *Croskey v. Universal Health Svcs., Inc.* (5th Dist.), 2009 Ohio 5951, ¶22, discr. app. not allowed (2010), 124 Ohio St.3d 1508, 2010 Ohio 799, 922 N.E.2d 970. There is nothing in the statute which suggests employer responsibility for the illegal activity of third parties outside the employment relationship.

“In ascertaining the legislative intent of a statute, ‘It is the duty of [a] court to give effect to the words used [in a statute], not to delete words used or to insert words not used.’” *Bernardini v. Board of Education* (1979), 58 Ohio St. 2d 1, 4, 387 N.E.2d 1222. How do we know that the Ohio General Assembly intended to address felony criminal or enumerated environmental violations by the employer and not third party conduct? The language of the statute itself.

After certain mandatory requirements are met, *i.e.* notice to the employer with “sufficient detail to identify and describe the violation,” and a subsequent failure by the employer to correct the violation or make a reasonable and good faith effort to do so within 24 hours (which necessarily presuppose that the violation actually exists and the employer has the ability to correct the violation with immediacy), R.C. § 4113.52(A)(1)(a) then permits the employee to “blow the whistle” on the employer to an outside regulatory authority. That Section provides, in relevant part, “***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.” (Emphasis added). Likewise, R.C. § 4113.52(A)(2) provides: “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.” (Emphasis added).

It seems clear that the Ohio General Assembly intended that employees who are faced with employers committing a “criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety” or criminal environmental offenses, would have job protection for reporting the employer to a regulatory authority who could take action against the employer. There’s nothing within the four corners of the statute that indicates it was ever intended to apply to the criminal conduct of third parties.

Nonetheless, despite this seemingly clear language, the Fifth District concluded that the whistleblower statute could apply even where the Village itself had not committed any criminal violation: “Furthermore, we find the Village has authority to correct the alleged illegal activity of CYT, even if the Village was not directly involved in criminal activity.” *Lee v. Village of Cardington* (5th Dist.), 2013-Ohio-3108, ¶26. Such an interpretation flies in the face of the legislative intent as reflected in the language contained in the statute.

Why would the Ohio General Assembly build such immediacy into the statute if it was intended to address more than just employer conduct? Indeed the statute refers to those criminal offenses which are an “imminent” risk of physical harm to persons or a hazard to public health or safety. “‘Imminent’ is defined in Webster’s New International Dictionary (2 Ed.1957) 1245, as ‘near at hand, impending, threatening to occur immediately.’” *Cincinnati v. Baarlaer* (1st Dist. 1996), 115 Ohio App.3d 521, 526-527, 685 N.E.2d 836, 840. “Although no Ohio case has specifically determined the scope or meaning of the word ‘imminent,’ it has been defined as an action or event ‘on the point of happening’ or one that is ‘impending.’” *State ex rel. Bond v. Montgomery* (1st Dist. 1989), 63 Ohio App.3d 728, 737. “The Revised Code does not define the word ‘imminent.’ Therefore, because the word is not defined by statute, we must apply the plain, ordinary meaning in the English language. Webster’s II New Riverside University Dictionary

(1984) 611, defines the word `imminent' as `about to occur at any moment.'" *In re Jenkins* (5th Dist. 2004), 2004 Ohio 2657, ¶14.

The immediacy is also reflected in the following language as well: "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***.*" (Emphasis added). Again, this language presupposes an employer criminal violation which the employer can quickly correct with the consequence of a failure to do so being that the employee can report the employer's failure to an outside regulatory authority.

As applied in the case *sub judice*, to the extent Lee was notifying the Village about equipment failures at the wastewater treatment plant, which may require substantial expenditures of capital to repair or replace, Lee admitted the obvious:

Q That's not something the Village could correct within 24 hours, is it?

A **There isn't anything they can correct in 24 hours....**

Lee depo. at 218, l. 8-18 (emphasis added).

Turning back to the Fifth District's conclusion that "the Village has authority to correct the alleged illegal activity of CYT," that's obviously not something the Village can "correct" in 24 hours after an oral or written employee report. By including such a requirement, it is difficult to imagine that the Ohio General Assembly intended to intrude upon the decisions of local prosecutors whether to take action or to otherwise limit local prosecutors to 24 hours to make a decision whether to prosecute. In other words, it does not appear that the whistleblower statute was ever intended to interfere with or apply to discretionary decisions which are solely the province of a local prosecutor. Indeed, it took several years for first the Ohio EPA, and later the

Federal EPA, to investigate Cardington Yutaka Technologies, and for the U.S. Attorneys to prosecute CYT.

Relative to the Village, Lee wasn't a whistleblower for three reasons.

A. Lee failed to comply with the statute.

First, Lee failed to comply with the statute. "Protection as a whistleblower requires an employee's **strict compliance** with the dictates of R.C. 4113.52." *Miller v. Rodman Public Library Bd. of Trustees* (5th Dist.), 2009-Ohio-573, ¶17 (emphasis added); see also *White v. Fabiniak* (11th Dist.), 2008 Ohio 2120, ¶30; *Grove v. Fresh Mark, Inc.* (7th Dist.), 156 Ohio App.3d 620, 2004-Ohio-1728, ¶19, 808 N.E.2d 416; *Poluse v. City of Youngstown* (7th Dist. 1999), 135 Ohio App.3d 720, 729; *Davidson v. BP America, Inc.* (8th Dist. 1997), 125 Ohio App.3d 643, 654. "Failure to strictly comply with the notice requirements of the Whistleblower statute will defeat a claim under R.C. § 4113.52." *Naples v. Rossi* (7th Dist.), 2005- Ohio-6931, ¶40.

During the course of discovery, the Village requested that Lee produce a copy of any written reports he allegedly prepared and submitted to the Village.¹ Lee was unable to produce these supposed written reports. It would be impossible to produce that which never existed, which Lee confirmed at his February 13, 2012 deposition.

Lee twice admitted under oath that everything he did was verbal and that he never prepared a written report to either Village Council or Village Administrator Ralley regarding his concerns about glycol because he didn't "do that sort of thing":

Q Did you **ever** prepare a written report to Village Council **which addressed these concerns about Glycol?**

¹ Specifically, the Village's Request for Production No. 9 stated: "Produce any and all written reports to Plaintiff's supervisor regarding any claimed hazard to public health or safety, which the Village caused and had the authority to correct." The Village received no reports of any kind from Lee.

A *Everything I did was verbal.*

Q Okay.

Is there any particular reason why you **never** prepared a written report to Village Council?

A I grew up at the wrong time. My understanding is when I sit down and I look at you and I talk to you what we're talking about is the way it is. But in today's world I'm behind, so that's my fault that *I don't do that sort of thing.*

Q Did you **ever** prepare a written report to Mr. Ralley?

A *No*; only talk.

Lee depo. at 107, l. 2-19 (emphasis added); at 143, l. 4-10 ("No written report....Just verbal").

R.C. § 4113.52(A)(1)(a) requires that any oral report be followed by a written report: "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..." "In statutory construction, the word 'may' shall be construed as permissive and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage." *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, 271 N.E.2d 834, syllabus ¶1. Lee's claim fails on this ground alone.

B. Lee's Affidavit, which is contradicted by his prior deposition testimony, fails to create a genuine issue of material fact because he did not identify and report any violation by the Village of Cardington.

In his Merit Brief, Lee argues that his Affidavit, which directly contradicts his prior deposition testimony, creates a genuine issue of material fact. This Court has observed that the term "sham affidavit" is used by federal courts to describe "a contradictory affidavit that indicates only

that the affiant cannot maintain a consistent story, or is willing to offer a statement solely for the purpose of defeating summary judgment." *Pettiford v. Aggarwal*, 126 Ohio St.3d 413, 414, 2010-Ohio-3237, ¶1, 934 N.E.2d 913, citing *Jiminez v. All Am. Rathskeller, Inc.* (C.A.3, 2007), 503 F.3d 247, 253. "With respect to a nonmoving party, the analysis is a bit different. If an affidavit appears to be inconsistent with a deposition, the court must look to any explanation for the inconsistency. We do not say that a nonmoving party's affidavit should always prevent summary judgment when it contradicts the affiant's previous deposition testimony. After all, deponents may review their depositions and correct factual error before the depositions are signed." *Byrd v. Smith*, 110 Ohio St.3d 24, 2006 Ohio 3455, ¶26-27, 850 N.E.2d 47. We therefore held, "An affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat a motion for summary judgment." *Id.* at paragraph three of the syllabus." *Pettiford*, 2010-Ohio-3237, ¶¶25-26.

When Lee testifies at his deposition that he never provided a written report to either Village Council or Village Administrator Ralley regarding his concerns about glycol, because he "doesn't do that sort of thing," then turns around and says he did provide a written report to Ralley (which he never produced in discovery and isn't part of the record before the trial court), that's a perfect example of a sham Affidavit. However, the Affidavit was substantively deficient in a number of other respects.

In Affidavit ¶22, Lee states that he provided a "supervisor's report" to Village Administrator Ralley. However, the alleged report did not claim that the Village had committed a violation which 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." According to Affidavit ¶22, the purpose of this report was not to get the Village to address an "imminent" danger to public health or safety

within 24 hours, but rather “village council could use the report *as a tool to seek reimbursement from CYT.*” (Emphasis added). By Lee’s own testimony, the Village’s conduct was not the target of this alleged report.

Furthermore, Lee does not believe this report was ever provided to Village Council. How could Village Council take an adverse employment action against Lee predicated upon an alleged written report that they never received? If the written report was designed to help the Village “seek reimbursement from CYT,” why would Village Council retaliate against Lee for submitting a report which would ostensibly help the Village? It makes no sense.

Notwithstanding his prior deposition testimony where he claimed that his reports to both Village Council and Ralley concerning glycol were oral, in Affidavit ¶22, Lee claims that his written report to Ralley outlined the problems that the glycol was causing the wastewater treatment plant, which primarily focused upon the effect on the Village’s equipment. Even assuming that’s the case, it does not identify with “sufficient detail” any criminal violation by the Village, let alone one that is “likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety, a felony.”

Turning to the September 15, 2008 Village Council meeting referenced in his Affidavit, Lee alleges he made an oral report to Village Council. Affidavit ¶18. Lee does not claim that he followed that oral report with a written report to Village Council. Thus, there’s no evidence that he complied with the subsequent mandatory written report requirement.

There’s also no evidence that, after that September 15, 2008 meeting, Lee “blew the whistle” and contacted either the Ohio EPA or Federal EPA regarding alleged criminal or environmental violations by the Village. And, why would he? Lee knew in 2007 that the Ohio

EPA had cleared the Village of any wrongdoing with regarding to its wastewater treatment plant operations, and that in early 2008, the federal EPA did as well.

Paragraph 23 of the Fifth District's Opinion is largely taken from Lee's Affidavit. However, there are three deficiencies with the court of appeals reliance upon same.

First, while the court is required to construe the facts most favorably to the non-moving party, the same is not true of legal conclusions. See, e.g., *Tuleta v. Medical Mut. of Ohio* (8th Dist.), 2014-Ohio-396, ¶21, citing *Ashcroft v. Iqbal* (2009), 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868.

Second, Lee's Affidavit only sets forth a possibility that the Village may violate its permit at some point in the future. There was no evidence that this was a present violation, which was "likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety, a felony" and was subject to correction by the Village within 24 hours. In other words, the Fifth District treated the mere possibility as grounds for application of the statute where the statute requires an actual violation.

Third, in ¶24 of the Opinion, the Fifth District opines that "If the levels are exceeded, the Village is violating the law." The problem is that there is absolutely no evidence whatsoever in the record, the inexorable zero, that Lee (or anyone else) actually went out and measured the glycol level in Whetstone Creek or did anything else to determine whether the Village was in danger of violating its permit. Basically, the Fifth District permitted Lee to premise his "whistleblower" claim upon pure speculation without any actual facts or data to support what was nothing more than a mere possibility. Additionally, how could anyone form a reasonable and good faith belief that the employer, *i.e.* the Village, was violating the law when the employee did nothing whatsoever to verify or substantiate that his allegations had any factual support

whatsoever? Lee didn't present evidence that the Village's treated discharges exceeded the permitted level for even a single day. That's a far cry from what the whistleblower statute requires in terms of reporting details.

C. There's no evidence in the record that Lee "blew the whistle" to either the Ohio EPA or Federal EPA concerning the Village allegedly violating its permit.

R.C. § 4112.52(A)(2) does not require a written report. That Section provides "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."

There is no evidence in the record that Lee contacted either the Ohio EPA or Federal EPA to report any violations of the foregoing Ohio Revised Code Chapters. It's not in his deposition, nor his Affidavit. There is independent evidence which establishes that such an event never occurred. Ohio EPA representative Mike Sapp submitted an Affidavit, in response to a public records request, that no such documentation existed or was ever sent to him by Lee. The Federal EPA also submitted a certified and authenticated response that it had no records to or from Lee either.

Lee also testified that the Village was never threatened by the EPA regarding a potential loss of its permit to operate the wastewater treatment plant:

Q At any point in time after Mr. Barlow came on the scene from the Federal EPA, are you aware of the Village of Cardington being threatened in terms of loss of their permit or penalties or fines to the Village itself?

A I'm not aware that there were any.

Lee depo. at 60, l. 13-17. Lee also admitted that during the entire time he was employed, the Village never lost any of its EPA permits. *Id.* at 17, l. 15-25.

Notwithstanding his attorney's attempt to re-write history, the reason Lee's alleged report did not target the Village is obvious from his prior testimony where he had indicated that the Village had been cleared of any wrongdoing by both the Ohio EPA and Federal EPA. 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. Lee testified as follows:

Q Would it be fair to say that one of the things you did first was attempt to eliminate the Village as being the cause of these bacterial problems?

A What we first did was double-checked our procedure so that we were handling the operation correctly.

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 (emphasis added).² After interviewing Lee and license holder Mike Chapman, according to Lee, Dave Barlow from the federal EPA Criminal Division Barlow quickly determined that the Village's procedures and operations were **not** the problem. *Id.* at 54, l. 18-25; at 55, l. 1-10; at 56, l. 5-14.

Once the Ohio EPA had ruled out the Village in 2007 and the Federal EPA had ruled out the Village in 2008 as a cause of the problem, how could Lee have a reasonable and good faith

² When asked whether there was anything after 2007, Lee did not identify water pollution or discharges into Whetstone Creek, but only the issue of stormwater infiltration into the sanitary sewers. Lee depo. at 152, l. 12 to 154, l. 18. Lee conceded that this was a completely separate issue from CYT contamination problem. *Id.* at 158, l. 1-4.

belief that the Village had committed any crime? No rational person would and that explains why the alleged written report doesn't accuse the Village of any wrongdoing.

R.C. § 4113.52(A) must be strictly construed.

The Amici have argued that the whistleblower statute should be liberally construed. However, this assertion is not supported by either case precedent or the language of the statute itself. For an employee to be afforded protection as a "whistleblower," the employee must strictly comply with the requirements of R.C. 4113.52. An employee's failure to do so bars him or her from claiming the protections of the statute. *Contreras v. Ferro Corp.* (1995), 73 Ohio St.3d 244, 652 N.E.2d 940, syllabus; see also *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 1997 Ohio 219, 677 N.E.2d 308, syllabus ¶2. The statute has been afforded a strict, not liberal construction.

When the Ohio General Assembly deems it necessary to have a statute liberally construed, the legislature knows how to do so. For example, the Ohio General Assembly determined that R.C. Chapter 4112 shall be liberally construed. Indeed, R.C. § 4112.08 expressly provides that "This chapter shall be construed liberally for the accomplishment of its purposes, and any law inconsistent with any provision of this chapter shall not apply." There is no similar language contained in the whistleblower statute.

CONCLUSION

In the course of adopting Proposition of Law No. 1, the Fifth District's decision should be reversed and the trial court's decision granting summary judgment to the Village reinstated.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of Appellant Village of Cardington's Reply Brief was served via regular U.S. Mail on this 22nd of May 2014 upon:

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