

[Cite as *Ressler v. Ohio Dept. of Transp.*, 2009-Ohio-5857.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Karen Ressler,	:	
Appellant-Appellant,	:	
v.	:	No. 09AP-338 (C.P.C. No. 07CVF12-17187)
Ohio Department of Transportation,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

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D E C I S I O N

Rendered on November 5, 2009

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*Jetta Mencer*, for appellant.

*Richard Cordray*, Attorney General, *Pooja Alag Bird* and *Brooke E. Leslie*, for appellee.

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APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Appellant, Karen Ressler, appeals from a judgment of the Franklin County Court of Common Pleas affirming an order of the State Personnel Board of Review ("SPBR") that granted the motion of appellee, Ohio Department of Transportation ("ODOT"), to dismiss appellant's whistleblower claim. Appellant timely appeals, assigning a single error:

THE STATE PERSONNEL BOARD OF REVIEW ERRED IN DISMISSING APPELLANT'S COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION.

Because the common pleas court did not err in affirming the SPBR's order that dismissed appellant's appeal for lack of subject-matter jurisdiction, we affirm.

### **I. Procedural History**

{¶2} Appellant is an administrative assistant for ODOT. On February 1, 2006, an incident transpired in ODOT's offices in which ODOT's chief investigator, Les Reel, confronted several ODOT employees about a missing computer hard drive. The meeting was heated, and at some point Reel indicated that if the hard drive were not returned by the following week, he would come back to express his disapproval. Those present at the meeting had varying accounts of Reel's actual language. Appellant was not present at the February 1, 2006 meeting, but she, like many ODOT employees, heard of it. At some point, appellant told her husband about the meeting.

{¶3} On February 3, 2006, two days after the meeting, appellant went to a Kroger store and transmitted by facsimile an anonymous letter to the Office of the Inspector General ("OIG"). The letter stated, in part, that "[o]n Wednesday February 1 Les Reel, Chief Investigator of Ohio Department of Transportation threatened employees by saying he was going to drop a bomb on District 5." According to the letter, when "he said it he was acting like a mad man. He was shaking his finger in the employees [sic] faces. He would ask a question but before you could answer he would start yelling again." The letter advised "[h]e said that if a hard drive didn't show up by Friday at quitting time that he was going to drop a bomb on District 5 on Monday. He said it twice." The letter portrayed Reel as "very threatening just with his mannerisms but his words matched his demeanor." The letter further indicated the employees of ODOT's District 5 feared Reel and did not want to return to work until he was removed.

{¶4} The OIG investigated the letter as a bomb threat because it contained the words "drop a bomb on District 5." In the course of its investigation, the OIG directly asked appellant about her involvement in sending the letter. Although first denying her involvement altogether, appellant eventually admitted to sending the facsimile; she disavowed any knowledge of the letter's contents. Appellant explained that her husband, Larry Fierbaugh, authored the letter himself but asked her to send it by facsimile.

{¶5} The OIG concluded appellant's letter had no merit as a literal bomb threat and decided Reel simply used colorful language to figuratively express his disapproval of the missing hard drive. As to appellant, the OIG's official report on the matter described appellant's conduct during the investigation as "evasive and uncooperative." (OIG Report of Investigation, 7.) In addition, in a letter from the OIG to the director of ODOT, the OIG stated appellant "committed acts of wrongdoing by sending false statements to this office and providing false testimony under oath." (OIG letter.) As a result of the OIG investigation, ODOT issued appellant a 30-day suspension for violating (1) ODOT Directive WR-101 #4, interfering and/or failing to cooperate in an official investigation or inquiry and (2) ODOT Directive WR-101 #5, violations of Section 124.34 of the Ohio Revised Code, failure of good behavior.

{¶6} On August 1, 2006, appellant filed an appeal to the SPBR both challenging her suspension and claiming whistleblower protection pursuant to R.C. 124.341 ("whistleblower claim"). The SPBR dealt separately with the suspension appeal and the whistleblower claim. In his Report and Recommendation of March 19, 2007, the Administrative Law Judge ("ALJ") recommended dismissing appellant's suspension appeal because appellant, an employee in ODOT's career professional service, appealed

a suspension, not a removal. Concluding the SPBR had jurisdiction over employees like appellant only when the employer's action involved removal, the ALJ determined the SPBR did not have jurisdiction over appellant's appeal from her suspension. The SPBR adopted the ALJ's Report and Recommendation, and appellant did not appeal that order to the common pleas court.

{¶7} Regarding the whistleblower claim, the ALJ issued a procedural order on November 14, 2006 directing appellant to identify the "report" she filed, as a report is a statutory requirement for invoking the SPBR's jurisdiction under the whistleblower statute. Appellant responded by identifying the letter her husband authored and she by facsimile sent anonymously to the OIG. To her response appellant attached her husband's sworn statement. In it, appellant's husband claimed full responsibility for the content of the letter and for asking appellant to transmit the letter to the OIG. Appellant essentially denied any involvement in authoring the "report" sent to the OIG.

{¶8} ODOT moved to dismiss the whistleblower claim for lack of jurisdiction. In her response to the motion to dismiss, appellant again denied writing the "report" sent to the OIG and again assigned responsibility to her husband for authoring and sending the letter. On May 2, 2007, the ALJ issued a Report and Recommendation concluding appellant did not meet the threshold reporting requirements of R.C. 124.341 necessary to invoke the SPBR's jurisdiction. Accordingly, the ALJ recommended dismissing appellant's whistleblower claim. The SPBR adopted the ALJ's recommendation and on July 24, 2007 ordered appellant's whistleblower claim be dismissed.

{¶9} Pursuant to R.C. 119.12, appellant appealed the SPBR's decision to the Franklin County Court of Common Pleas. In a decision and judgment entry dated

March 12, 2009, the common pleas court affirmed the SPBR's decision. Dismissing the whistleblower action was proper, the court concluded, because appellant neither met the reporting requirements of R.C. 124.341 nor made any effort to determine the accuracy of the allegations in the writing.

## II. Assignment of Error

{¶10} In her sole assignment of error, appellant contends the common pleas court erred in affirming the SPBR's order dismissing her whistleblower claim for lack of jurisdiction.

{¶11} Pursuant to R.C. 119.12, a party adversely affected by the SPBR's decision may appeal that decision to the common pleas court. The common pleas court "may affirm the order of the agency complained of in the appeal" if, after considering "the entire record and such additional evidence as the court has admitted, \* \* \* the order is supported by reliable, probative, and substantial evidence and is in accordance with the law." *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110, quoting R.C. 119.12. The court of common pleas must, in reaching its decision, appraise all the evidence as to credibility of witnesses, the probative character of the evidence and the weight given the evidence. *Conrad* at 110-11, citing *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, paragraph one of the syllabus.

{¶12} "When the common pleas court in its appraisal of the evidence determines that there exist legally sufficient reasons for discrediting certain evidence relied upon by the administrative body and necessary to its determination, the court may reverse, vacate, or modify the administrative order." *Beeler v. Franklin Cty. Sheriff* (1990), 67 Ohio App.3d 748, 753. Where, however, the evidence supports the board's decision, the

common pleas court must affirm the board and may not substitute its judgment for that of the board. *Steinbacher v. Louis* (1987), 36 Ohio App.3d 68, 71.

{¶13} An appellate court's review of the board's decision is even more limited than the common pleas court's review. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. "Absent an abuse of discretion on the part of the trial court, a court of appeals may not substitute its judgment for those of [the administrative agency] or a trial court." *Id.*, citing *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 260-61. Thus, the appellate court does not possess the power to weigh the evidence and evaluate the credibility of the witnesses; instead, the appellate court must simply determine whether the common pleas court abused its discretion. *Ohio State Univ. v. Kyle*, 10th Dist. No. 06AP-168, 2006-Ohio-5517, ¶28, citing *Graziano v. Bd. of Edn. of Amherst Exempted Village School Dist.* (1987), 32 Ohio St.3d 289.

{¶14} Here, the SPBR found appellant did not satisfy the threshold reporting requirements of her whistleblower claim, leaving the SPBR without subject-matter jurisdiction over the claim. An employee seeking to invoke the jurisdiction of the SPBR and the protection of R.C. 124.341 "must show: (1) a written report (2) transmitted to his/her supervisor, appointing authority, the state inspector general, or other appropriate legal official which; (3) identifies a violation of state or federal statute, rule, or regulation, or a misuse of public resources." *Wade v. Ohio Bur. of Workers' Comp.* (June 10, 1999), 10th Dist. No. 98AP-997, citing *State ex rel. Cuyahoga Cty. v. SPBR* (1998), 82 Ohio St.3d 496. Only after meeting the procedural threshold of demonstrating that he or she filed a written report does an employee have the opportunity to establish the employer's

action actually was retaliation for whistleblowing activity. *Id.* The first issue, then, is whether the writing appellant relies on suffices as a "report" under the statute.

{¶15} Appellant maintains the February 3, 2006 letter demonstrates she complied with the "report" requirement of R.C. 124.341. Appellant, however, admitted she did not author the letter, and she disclaimed knowing its contents when she sent it. Indeed, appellant admitted only to being the person who, in response to her husband's direction, sent the letter by facsimile to the OIG. Appellant nonetheless contends that her merely "filing" the report, even though her husband authored it, satisfies the reporting requirement of her whistleblower claim.

{¶16} This court addressed a very similar situation in *Haddox v. Ohio State Attorney General*, 10th Dist. No. 07AP-857, 2008-Ohio-4355. The employee in *Haddox* relied on a collection of communications in an attempt to satisfy the reporting requirements of R.C. 124.341, among them a letter the employee's former co-worker authored. Although she did not write the letter or affix her name to it, the employee hand delivered the co-worker's letter to a supervisor. *Haddox* at ¶8. When the SPBR dismissed her appeal for lack of subject-matter jurisdiction, the employee argued that, although she did not actually author the letter, her delivering the co-worker's letter met the statutory requirement that she file a report. *Id.* at ¶38.

{¶17} In rejecting the employee's argument in *Haddox*, this court explained that "the primary objective of R.C. 124.341 is to protect state employees who report violations or misuse from retaliation." *Id.* at ¶44. When we considered the objective and construed the whole of R.C. 124.341, we concluded "the [co-worker's] letter does not meet the requirements of R.C. 124.341." *Id.* Although *Haddox* sought to invoke the statute's

protection, we noted she "did not write the letter, which content she relies on for that purpose." We specifically noted that "[r]etaliatio[n] based on the mere transmission of a report is tenuous at best," explaining "the statutory scheme clearly contemplates that the employee making the report play a bigger role than that of mere courier." *Id.* We thus concluded an employee's responsibility for delivering the writing is not sufficient to comply with the statute's reporting requirements.

{¶18} *Haddox* controls here. Appellant, like the employee in *Haddox*, did not author the letter on which she now relies for whistleblower protection. Although appellant was responsible for the letter's transmission to the appropriate authority, her being a "mere courier," per *Haddox*, is not sufficient. Simply causing the letter's transmission, without any part in the letter's authorship, does not meet the written report requirement under R.C. 124.341.

{¶19} Despite appellant's admitting she was not responsible for the content of the letter transmitted to the OIG, appellant argues she is entitled to whistleblower protection because the OIG recommended she be disciplined on the basis of her involvement with that letter. Appellant essentially argues that in disciplining her for her role in sending the report to the OIG, ODOT implicitly acknowledged appellant was responsible for filing it.

{¶20} Appellant's argument is unpersuasive. ODOT's disciplining appellant for transmitting the letter does not estop ODOT from denying that appellant authored the report. Sending or delivering a letter and actually composing that writing are plainly different and invoke the same distinction drawn in *Haddox* and applied here.

{¶21} Moreover, what the OIG believed about appellant's authorship is not relevant to the issues we address in appellant's appeal. While ODOT may have relied on



the OIG's report, ODOT's decision to discipline appellant resulted not only from her sending the letter but also her "evasive and uncooperative" nature during the official investigation, citing specific workplace directives appellant violated. Because the standard for disciplining an employee is different than the standard for an employee seeking whistleblower protection, appellant's comparing the two is unconvincing.

#### **IV. Disposition**

{¶22} Appellant, for the stated reasons, did not satisfy the threshold reporting requirement of R.C. 124.341. As such, the SPBR did not err in dismissing appellant's appeal for lack of jurisdiction, and the Franklin County Court of Common Pleas did not abuse its discretion in affirming that dismissal. Accordingly, we overrule appellant's sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN and McGRATH, JJ., concur.

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