[Cite as *Vivo v. Ohio Bur. of Workers' Comp.*, 2009-Ohio-6417.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Alicia Vivo,	:	
Appellant-Appellant,	:	No. 09AP-110 (C.P.C. No. 08CVF08-12005)
v.	:	(REGULAR CALENDAR)
Ohio Bureau of Workers' Compensation,	:	
Appellee-Appellee.	:	

D E C I S I O N

Rendered on December 8, 2009

Saker Law Offices, and *Theodore R. Saker, Jr.,* for appellant.

Richard Cordray, Attorney General, *Timothy M. Miller* and *James A. Hogan*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Appellant, Alicia Vivo ("appellant"), appeals from a decision of the Franklin County Court of Common Pleas affirming an order of the State Personnel Board of Review ("SPBR"), which dismissed her appeal for lack of jurisdiction, finding appellant failed to establish that she met the threshold procedural requirements for a "whistleblower" as set forth in R.C. 124.341. For the following reasons, we affirm.

{¶2} Appellant began employment with appellee, the Ohio Bureau of Workers' Compensation ("BWC") in 1990, as an "at will" contract employee. In November 1992,

appellant became a full-time state employee. Appellant was promoted to Director of Alternative Dispute Resolution in 1999.

{¶3} Appellant was notified via letter dated December 14, 2007, that she was being terminated for cause. As grounds for her termination, BWC asserted appellant spent a significant amount of time doing personal business (school work) on state time and also used state resources, such as her state computer, for personal business. The BWC further asserted that appellant also allowed her subordinates to do school work on state time.

{¶4} Appellant filed an appeal with SPBR asserting that her removal was unlawful, unreasonable, arbitrary and without just cause. She also asserted that her removal constituted an unlawful retaliatory discharge, which violated R.C. 124.341(D), the whistleblower statute.[1]

{¶5} Appellant claims whistleblower status based upon a document entitled "MEMO" and addressed to Tina Kielmeyer, Interim Administrator, with a subject line of "MDL" and dated June 8, 2005. Appellant was the author of said "MEMO." The memo, in its entirety, states:

> This memo is to reiterate our phone conversation on September 27, 2004. I had received some sensitive information from a couple of employees who work in the Investments department and due to the nature of the information I thought it was appropriate to report this to you and Administrator Conrad. I was told there was a lot of money lost through Hedge funds with MDL. Because I did not understand this information, and functions of the Investment dept, that is why I contacted [you] directly.

[1] Appellant's original notice of appeal filed December 14, 2007, involved two distinct claims, but SPBR bifurcated the claims. The issue on appeal before this court only addresses appellant's whistleblower claim. Therefore, we shall only address that claim.

{¶6} The hearing officer for SPBR recommended that appellant's appeal be dismissed for lack of jurisdiction, finding that appellant's memo, standing on its own, did not constitute a whistleblower report. SPBR adopted this recommendation. Appellant then appealed to the Franklin County Court of Common Pleas. The court of common pleas also found the memo to be insufficient to constitute a written report for purposes of the whistleblower statute.

{¶7} Appellant now appeals to this court and asserts the following assignments of error:

> I. *The Order of the State Personnel Board of Review and the Court Below are unsupported by reliable, probative and substantial evidence*.
>
> II. *The Order of the State Personnel Board of Review and the Court Below are unlawful, unreasonable and against the manifest weight of the evidence*.
>
> III. *Appellant is a "whistleblower" within the meaning of O.R.C. §124.341*.

{¶8} Appellant's first, second,[2] and third assignments of error all present interrelated issues and will therefore be addressed together.

{¶9} Appellant makes several assertions in support of her claim that she does qualify as a whistleblower within the meaning of R.C. 124.341. First, appellant contends that a written report is not required in order to qualify for whistleblower status under R.C. 124.341. Appellant cites to the language of this statute, which states that a civil service

[2] The correct standard of review for an administrative appeal under R.C. 119.12, such as the appeal here, is whether the order is supported by reliable, probative, and substantial evidence and is in accordance with the law and whether the common pleas court abused its discretion in making that determination. Therefore, we shall review appellant's appeal using this standard of review.

employee "may file a written report" and compares it to the language found in R.C. 4113.52, which governs whistleblower activity for employment relationships outside Chapter 124, and which states the employee "shall file with that supervisor or officer a written report[.]" Based upon this comparison, appellant argues the use of "may file" in R.C. 124.341 makes the filing of a written report discretionary, as opposed to mandatory. Appellant further argues the "shall file" language used in R.C. 4113.52 clearly makes the filing of a written report under that statute mandatory. Therefore, under the allegedly more lax reporting requirement set forth in R.C. 124.341, appellant submits the order from SPBR finding that the report must stand alone on its face is unsupported by reliable, probative, and substantial evidence.

{¶10} Second, appellant argues that, even if a written report is required, her memo complies with the requirements of R.C. 124.341(A). She contends that her memo properly identifies a violation as required by the statute, since a reasonable person would easily conclude that the memo called attention to a potential misuse of public resources. Appellant further asserts that her written report should be considered in the context of the oral report she made prior to the written memo. Appellant also notes that a local newspaper featured her as the source of the information involving the investment scandal at the BWC.

{¶11} Third, appellant argues that SPBR's order finding the written report to be simply a neutral statement and too vague to meet the requirements for whistleblower protection, has the effect of placing a "heightened reporting standard," as well as a chilling effect, upon potential whistleblowers. Appellant contends that because she is without investment knowledge or expertise, she cannot be expected to provide a detailed

description of the activities or violations she is reporting. She argues that her memo is sufficient to alert the proper individual or authority of a violation and, therefore, she is entitled to whistleblower protection.

{¶12} In an administrative appeal, pursuant to R.C. 119.12, the trial court reviews an order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with the law. In applying this standard, the court must "give due deference to the administrative resolution of evidentiary conflicts." *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111.

{¶13} The Ohio Supreme Court has defined reliable, probative, and substantial evidence as follows:

> (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

Our Place, Inc. v. Ohio Liquor Control Comm. (1992), 63 Ohio St.3d 570, 571. (Footnotes omitted.)

{¶14} On appeal to this court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. In reviewing the court of common pleas determination that the board's order was supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the court of common pleas abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680. Absent an abuse of discretion on

the part of the trial court, a court of appeals cannot substitute its judgment for that of the board or the trial court. *Pons v. Ohio State Med. Bd*., 66 Ohio St.3d 619, 621, 1993-Ohio-122. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157. However, on the question of whether the board's order was in accordance with the law, this court's review is plenary. *McGee v. Ohio State Bd. of Psychology* (1993), 82 Ohio App.3d 301, 305, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶15} We begin our discussion by examining R.C. 124.341,[3] which reads in relevant part as follows:

> (A) If an employee in the classified or unclassified civil service becomes aware in the course of employment of a violation of state or federal statutes, rules, or regulations or the misuse of public resources, and the employee's supervisor or appointing authority has authority to correct the violation or misuse, the employee may file a written report identifying the violation or misuse with the supervisor or appointing authority.
>
> If the employee reasonably believes that a violation or misuse of public resources is a criminal offense, the employee, in addition to or instead of filing a written report with the supervisor or appointing authority, may report it to a prosecuting attorney, director of law, village solicitor, or similar chief legal officer of a municipal corporation, to a peace officer, as defined in section 2935.01 of the Revised Code, or,

[3] Appellant's brief cites to the most recent version of R.C. 124.341, which became effective February 14, 2008. Here, we have cited the version that became effective on July 1, 2007. This statute originally became effective on September 17, 1986 and was subsequently amended on October 31, 1990, July 1, 2007, and February 14, 2008. The statute does not indicate that it was intended to have anything other than a prospective application. (See R.C. 1.48; *Kiser v. Coleman* (1986), 28 Ohio St.3d 259.) We further note that appellant filed her initial notice of appeal immediately following her termination on December 14, 2007. Regardless, the amendments which became effective on February 14, 2008, involved very minimal changes and have absolutely no effect on the outcome of the instant appeal.

> if the violation or misuse of public resources is within the jurisdiction of the inspector general, to the inspector general in accordance with section 121.46 of the Revised Code. In addition to that report, if the employee reasonably believes the violation or misuse is also a violation of Chapter 102., section 2921.42, or section 2921.43 of the Revised Code, the employee may report it to the appropriate ethics commission.
>
> (B) Except as otherwise provided in division (C) of this section, no officer or employee in the classified or unclassified civil service shall take any disciplinary action against an employee in the classified or unclassified civil service for making any report authorized by division (A) of this section, including, without limitation, doing any of the following:
>
> (1) Removing or suspending the employee from employment;
>
> * * *
>
> (D) If an appointing authority takes any disciplinary or retaliatory action against a classified or unclassified employee as a result of the employee's having filed a report under division (A) of this section, the employee's sole and exclusive remedy, notwithstanding any other provision of law, is to file an appeal with the state personnel board of review within thirty days after receiving actual notice of the appointing authority's action. If the employee files such an appeal, the board shall immediately notify the employee's appointing authority and shall hear the appeal. The board may affirm or disaffirm the action of the appointing authority or may issue any other order as is appropriate. The order of the board is appealable in accordance with Chapter 119. of the Revised Code.

{¶16} In contrast, R.C. 4113.52, the statute which governs whistleblower activity in employment relationships outside of Chapter 124, reads in relevant part as follows:

> (A)(1)(a) 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.

{¶17} In *Wade v. Ohio Bur. of Workers' Comp.* (June 10, 1999), 10th Dist. No. 98AP-997, we construed R.C. 124.341 and determined that in order to invoke the jurisdiction of SPRB and the protection of R.C. 124.341, a state employee must submit the following: (1) a written report, (2) that was transmitted to his/her supervisor, appointing authority, the state inspector general, or other appropriate legal official, (3) which identified a violation of a state or federal statute, rule, or regulation, or a misuse of public resources. Id. See also *State ex rel. Cuyahoga Cty. v. State Personnel Bd. of Review* (1998), 82 Ohio St.3d 496.

{¶18} Furthermore, in *Wade*, we determined that "[t]he requirement of a written communication, specifically addressed to an appropriate individual, is an essential element of whistleblower protection and will be strictly applied." *Wade*, supra, citing *Kulch v. Structrual Fibers, Inc*., 78 Ohio St.3d 134, 1997-Ohio-134.

{¶19} The burden of meeting the procedural requirements of the whistleblower statutes rests with the employee, who must show by a preponderance of the evidence that there is a written report filed with the appropriate supervisor or other named authority and that the report provides "sufficient detail to identify and describe the alleged violation." *Wade*, supra. See also *Robins v. Ohio Dept. of Liquor Control* (June 25, 1996), 10th Dist. No. 96APE01-38, and *Contreras v. Ferro Corp*. (1995), 73 Ohio St.3d 244.

{¶20} Based upon our ruling in *Wade*, we disagree with appellant's contention that a written report is not mandatory. To the contrary, a written report is specifically required

under *Wade*. Additionally, appellant's efforts to draw a distinction between the use of "may" in R.C. 124.341, and the use of "shall" in R.C. 4113.52, as they relate to a written report, are without merit. As properly determined by the common pleas court, R.C. 124.341 simply provides the employee more than one avenue by which to report a violation or misuse in writing. It is clear, based upon the statute and upon our holding in *Wade*, that a written report is required and that this requirement must be strictly applied.

{¶21} We also disagree with appellant's argument that her written report should be considered in the context of her previously provided oral report or that the court should consider the totality of the circumstances here. We find appellant's reliance upon *Haddox v. Ohio State Atty. Gen*., 10th Dist. No. 07AP-857, 2008-Ohio-4355, is misplaced.

{¶22} *Haddox* looked at the context in which the report was made in order to determine whether the written report was made in good faith and to determine the purpose for which the written communication was made. It involved an individual in a supervisory position. The issue was whether Haddox was reporting a violation, which could provide her with whistleblower protection, or simply making a report in fulfillment of her employee job responsibilities, which would not provide her with whistleblower protection. Therefore, consideration of the context was necessary. *Haddox* did not involve a situation where the context was considered simply because the written report itself failed to provide sufficient information to identify a violation, as is the case here. Consideration of appellant's oral communication here would defeat the purpose of the requirement of a written report, would diminish protection for legitimate whistleblowers, and would invite the potential for a "he said-she said" type of situation.

{¶23} The common pleas court also endorsed SPBR's determination that the written report itself must meet the requirements of the whistleblower statute in order for the employee to be provided with protection. This is not an "overly technical standard," as the requirement of a written communication must be strictly applied. See *Wade*, supra. The fact that a local newspaper may have pegged appellant as the source of the information does not change this. Therefore, the court of common pleas did not err in determining that SPBR's order was supported by reliable, probative, and substantial evidence and was in accordance with law.

{¶24} Additionally, in considering the written report, we find no abuse of discretion in the common pleas court's determination that the written report itself is insufficient to meet the requirements set forth under R.C. 124.341. The memo fails to identify a violation of law or a misuse of public resources. The memo simply asserts the author has "sensitive information" and that she was told there had been "a lot of money lost through Hedge funds with MDL." However, investments frequently lose money for reasons that have absolutely nothing to do with fraud or violations of the law or misuse of public resources. Yet, nowhere within the memo does appellant allege that any statute or rule was violated. Under *Wade*, the employee must prove the existence of a written report which provides "sufficient detail to identify and describe the alleged violation." *Wade*, supra.

{¶25} While the written report need not necessarily cite to the particular statute that was violated, the memo here fails to allege or even imply that this loss of money was the result of fraud, wrongdoing, or unethical and/or illegal conduct. Instead, it is a neutral statement that lacks the specificity necessary for the recipient of the memo to conclude

that some type of fraud or misuse of public resources or violation of the law occurred. Furthermore, the memo fails to attribute the alleged loss to BWC employees or someone over whom the recipient even had supervisory authority. Additionally, the memo fails to set forth a time frame as to when this alleged loss occurred, which could have been weeks, months, or years earlier.

{¶26} Appellant submits that the use of the phrase "hedge funds," on its face, is sufficient to qualify as the identification of a "misuse of public resources" because hedge funds are very risky and highly speculative.[4] Without providing any authority in support, appellant argues that state law does not permit investments in hedge funds by state agencies such as the BWC, and therefore, such an investment is a "misuse of public resources." Our own independent legal research has failed to yield authority to adequately support this proposition.

{¶27} R.C. 4123.442 sets forth the duties of the workers' compensation investment committee and prohibits the investment of BWC assets in vehicles which, directly or indirectly, target things such as coins, artwork, horses, collectibles, jewelry or gems, stamps, antiques, artifacts, or memorabilia, or similarly unregulated investments which "are not commonly part of an institutional portfolio, that lack liquidity, and that lack readily determinable valuation." While hedge funds *can* be vehicles which target some of these items, we cannot say that such a possibility, without more, makes a hedge fund, on its face, a prohibited type of investment. Furthermore, we note that this statutory provision

[4] Appellant asserted this proposition for the first time during oral argument in the course of counsel's discourse with the court. Appellee also participated in this discourse during its own oral argument.

did not become effective until September 10, 2007, which is more than two years after appellant wrote the memo and nearly three years after her alleged oral report.

{¶28} Finally, we reject appellant's contention that her memo is sufficient to alert the proper authority or individual of a violation because she cannot be expected to provide more information regarding a violation, due to her lack of investment knowledge. We find appellant's efforts to distinguish this case from SPBR's finding in *McLean v. Bur. of Workers' Comp.* (Mar. 16, 2006), SPBR No. 05-WHB-09-0356, to be unpersuasive.

{¶29} In *McLean*, the employee appealed his unclassified removal from the position of Chief Investment Officer for the BWC. McLean argued that he was entitled to whistleblower protection under R. C. 124.341. SPBR dismissed McLean's appeal, finding he failed to comply with the threshold requirements set forth under the statute, due to his failure to identify any alleged violation or misuse of public resources in his written report. Appellant attempts to distinguish *McLean* from the instant case by arguing that McLean, who has specialized knowledge and expertise in the area of investments, should obviously be expected to provide a detailed report and, therefore, he should be held to a higher standard. Appellant, on the other hand, asserts that she should be held to a lower standard due to her lack of specialized knowledge.

{¶30} However, *McLean* does not stand for the proposition that someone who is an expert or who has specialized knowledge should be held to a higher standard in providing detailed information regarding a violation or a misuse of public resources. Instead, *McLean* states that one is not entitled to whistleblower protection if the written report fails to sufficiently identify an alleged violation or misuse of public resources. We are not subjecting appellant to a "high bar" by simply requiring that her written report meet

the requirements of the applicable whistleblower statute, which means her written report must provide sufficient detail to at least identify and describe the alleged violation or misuse of public resources, regardless of her expertise or background.

{¶31} Based upon the foregoing, we find appellant failed to meet the written report requirement found in R.C. 124.341 and, therefore, SPRB did not err in dismissing her appeal for lack of jurisdiction. Accordingly, we overrule appellant's first, second, and third assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and BROWN, JJ., concur.