ORIGINAL

IN THE SUPREME COURT OF OHIO

DONALD LEE,	)	CASE NO.: 13-1400
Appellee,	)	ON APPEAL FROM THE MORROW COUNTY COURT OF
vs.	)	APPEALS, FIFTH DISTRICT
VILLAGE OF CARDINGTON, OHIO,	)	CASE NO.: 2012 CA 0017
Appellant.	)	

BRIEF OF *AMICUS CURIAE* THE OHIO EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLEE DONALD LEE

MICHAEL S. KOLMAN (0031420)
mkolman@nplmlaw.com
D. WESLEY NEWHOUSE (0022069)
wnewhouse@nplmlaw.com
Newhouse, Prophater, Lechter & Moots, LLC
5025 Arlington Centre Blvd, Suite 400
Telephone: (614) 255-5441
Facsimile: (614) 255-5446

Counsel for Appellee

JOHN D. LATCHNEY (0046539)
john.latchney@frontier.com
Tomino & Latchney, LLC, LPA
803 East Washington Street, Suite 200
Medina, Ohio 44256
Telephone: (330) 723-4656
Facsimile: (330) 723-5445

Counsel for Appellant

GREGORY A. GORDILLO (0063445)
VALORE & GORDILLO LLP
21055 Lorain Road
Fairview Park, Ohio 44126
Telephone: (440) 333-7330
Facsimile: (440) 333-7576
ggordillo@vglawyer.com

Counsel for Amicus Curiae, the Ohio Employment Lawyers Association

FREDERICK M. GITTES (0031444)
THE GITTES LAW GROUP
723 Oak Street
Columbus, Ohio 43205
Telephone: (614) 222-4735
Facsimile: (614) 221-9655
fgittes@gitteslaw.com

Counsel for Amicus Curiae, the Ohio Employment Lawyers Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Ohio Employment Lawyers Association (OELA) is the state-wide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment, and civil rights matters. OELA is the only state-wide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. OELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness, while promoting the highest standards of professionalism and ethics.

As an organization focused on protecting the interests of workers who are subjected to unlawful discrimination, OELA has an abiding interest in ensuring the integrity of our system of civil adjudication of disputes. Our system needs to provide remedies that fairly compensate those subjected to discrimination; doing so can effectively deter such unlawful discrimination in the future. The aim of OELA's amicus participation is to cast light not only on the legal issues presented in a given case, but also on the practical effect and impact the decision in that case may have on access to the Courts for people who have been unlawfully treated in the workplace.

OELA has an interest in this case to ensure that individual employees who act to protect Ohio's citizenry from environmental crimes will not suffer retaliatory employment termination as a result.

STATEMENT OF THE CASE AND FACTS

OELA, as *Amicus Curiae,* adopts the Statement of the Case and the Statement of Facts contained in the brief of Plaintiff-Appellee Donald Lee.

SUMMARY ARGUMENT

The Appellant Village of Cardington, Ohio's ("the Village") Proposition of Law No. 1 should be rejected. The protection to Ohio's citizenry from environmental crimes and other serious harmful misconduct identified in Ohio's Whistleblower Protection Act should not be diminished. The Fifth District Court of Appeals correctly held that R.C. 4113.52 protects employees from retaliatory discharge for reporting environmental crimes being committed by third parties. Nothing in the statute expresses or implies that alleged violators being reported are limited to the whistleblowing employee's employer.

The Village's Proposition of Law No. 1 raises the issue of what is the scope of protected activity defined by R.C. 4113.52(A)(1) and (2). An R.C. 4113.52 whistleblower is protected only when reporting certain violations described in the statute. The Village contends that the statutes limit whom the violator can be for the report to fall within the scope of protected activity. But the statutes protect reports of "a violation" and "the violation" without using any prior or subsequent words to qualify whom the violator can be.

In sharp contrast, the General Assembly also defined protected activity in R.C. 4113.52(A)(3) and expressly limited who the reported violator can be. In R.C. 4113.52(A)(3), the General Assembly describes the violation as "a violation by a fellow employee." This difference alone is sufficient to demonstrate that the General Assembly

purposefully created a scope of protected activity in R.C. 4113.52(A)(1) and (2) that does not depend on who the alleged violator is.

Contrary to the Village's arguments, neither the employer's authority to correct the reported violation nor the employer's duty to respond to the report makes any difference regarding who the subject of the protected report must be. As long as the employer has authority to correct the alleged violation, it is within the scope of protected activity. The Village does not dispute that it had authority to correct the violation. As for the employer's statutory duty to respond, it has no impact on expanding or limiting the scope of protected activity. In that regard, the conduct of the employer and the employee are not related.

Rejecting the Village's Proposition of Law will prevent Ohio's protection from environmental crimes from being diminished. It most certainly will not – as the Village argues – impose liability on employers for environmental crimes committed by others. Nothing in R.C. 4113.52 could impose liability on an employer for others' conduct—the statute imposes liability only when an employer illegally retaliates against an employee who makes a report of illegal or unsafe conduct. That protection should remain intact.

If, however, this Court should accept the Village's Proposition of Law, or otherwise find that a whistleblower reporting environmental crimes by a third party is not protected by R.C. 4113.52, then this Court should provide the Fifth District Court of Appeals with a remand instruction to reconsider its holding that a common law cause of action for wrongful discharge in violation of public policy is barred because R.C. 4113.52 provided the whistleblower with adequate remedies. The two causes of action should be considered in light of each other. Without doing so, a risk of creating a gap exists that will allow the employees who act to protect the public against the serious harms identified in R.C.

4113.52(A)(1) and (2) to suffer employment retaliation at the expense of the public's safety and welfare.

ARGUMENT

I. APPELLANT'S PROPOSITION OF LAW SHOULD BE REJECTED, AND THIS COURT SHOULD CLARIFY THAT THE VIOLATIONS DESCRIBED IN R.C. 4113.52(A)(1) and (2) ARE NOT LIMITED TO VIOLATIONS BY THE WHISTLEBLOWING EMPLOYEE'S EMPLOYER.

Ohio "has a legitimate interest in knowing that the regulations which protect Ohio's citizenry are complied with by the persons being regulated. Any legitimate attempt by an employee to serve that public interest should be heralded with applause, rather than scorned with the state's endorsement of the employee's retaliatory discharge." *Phung v. Waste Mgmt, Inc.* (1986), 23 Ohio St. 3d 100, 105. So wrote Justice Clifford Brown in dissent to the *Phung* opinion. *Phung* held that no cause of action existed for an employee fired in retaliation for whistleblowing. In response to *Phung*, the General Assembly enacted Ohio's Whistleblower Protection Act, R.C. 4113.52. *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St. 3d 134, 157. Indeed, "the General Assembly enacted R.C. 4113.52 to remedy the defect in the law caused by this court's decision in *Phung[.]*" *Id.* at 158.

The Appellant, Village of Cardington, Ohio's ("the Village") Proposition of Law would be a clear step back toward 1986 and contrary to Ohio's legitimate interest in protecting its citizenry and the intent of the General Assembly when it enacted the Ohio Whistleblower Protection Act. The Fifth District Court of Appeals below carefully and correctly concluded that Plaintiff-Appellee Donald Lee's conduct was protected under Ohio's whistleblower statute, Revised Code Section 4113.52, and on this issue, the Court below should be affirmed. More specifically, however, the Ohio Employment Lawyers

urge this Court to recognize that reports of violations described in R.C. 4113.52(A)(1) and (2) include alleged violations by third parties and are not limited to violations by the whistleblowing employee's employer.

A. The plain language of R.C. 4113.52(A)(1) and (2) contains no limitation on the identity of an alleged violator for a report of the alleged violations to be protected activity.

R.C. 4113.52 was designed to protect whistleblowers and expects them to "be attuned to the public's safety." *Fox v. Bowling Green* (1997), 76 Ohio St. 3d 534, 538-39. Obviously, the public's protection fostered under the statute is not limited to protection from bad acts by employers. But that is precisely the limitation that the Village urges this Court to impose.

To achieve the statute's salutary purpose, R.C. 4113.52(A) defines protected activity. The elements of the protected activity are defined in R.C. 4113.52(A)(1) and (2) in terms of: a) the substance of a protected report; and b) the procedure required for protected reporting. *See, e.g., Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St. 3d 134, 141, *quoting, Contreras v. Ferro Corp.* (1995), 73 Ohio St. 3d 244, 246-49.

The substance of a protected report under R.C. 4113.52(A)(1)(a) must contain two components. 1) 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 2) "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 . . . ." [Emphasis added].

The substance of a protected report required under R.C. 4113.52(A)(2), is satisfied when "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 . . . ." [Emphasis added].

The Village suggests limiting protected reports by inserting into the statute the words, "by the employee's employer" after the words "a violation" or "the violation" in R.C. 4113.52(A)(1) and (2). But that suggestion is directly contrary to this Court's well established rule of statutory construction: "In determining intent, it is the duty of the court to give effect to the words used, not to delete words used or insert words not used." *Cline v. Ohio Bureau of Motor Vehicles* (1991), 61 Ohio St. 3d 93, 97.

In defining a whistleblower's protected activity, the General Assembly demonstrated that it could and would expressly decide to qualify who the violator was when the General Assembly thought such a limitation was appropriate. Indeed, protected activity is also defined in R.C. 4113.52(A)(3). While the violations described in R.C. 4113.52(A)(3) are similar to those in R.C. 4113.52(A)(1)(a), R.C. 4113.52(A)(3) differs substantially by expressly limiting who the violator can be.

Much like the Village wishes that the General Assembly had done in R.C. 4113.52(A)(1)(a), the General Assembly added words after "a violation" in R.C. 4113.52(A)(3) to limit the protected activity described in that portion of the statute to reports of violations by co-workers:

> If an employee becomes aware in the course of the employee's employment of a violation **by a fellow employee** of any state or federal statute, any ordinance or regulation of a political subdivision, or any work rule or company policy of the employee's employer 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. [Emphasis added].

This portion of the Whistleblower Protection Act makes clear that no strained interpretation of R.C. 4113.52(A)(1)(a) is necessary to determine who the violator must be for the report of the violation to be protected. When the scope of violators is limited, the General Assembly says so. No such limitation was provided in R.C. 4113.52(A)(1) or (2).

B. Neither the employer's authority nor the employer's duty to respond to a whistleblower's report limits the scope of protected activity under R.C. 4113.52(A)(1) or (2).

Without the express language to limit protected activity to reports of violations by the whistleblower's employer, the Village tries twisting existing words into evidence of legislative intent. First, the Village asserts that the General Assembly intended to limit protected activity under 4113.52(A)(1)(a) to violations by the whistleblower's employer because the statute requires that the violation must be one that the "employer has authority to correct."

The first, and most obvious, reason the argument fails is that the Village had the authority to correct the violation about which Lee complained. The Village has not denied having the authority to correct the violation. The Village could have prosecuted the violator, Cardington Yutaka Technologies ("CYT"). Instead, however, the Village chose not to exercise its discretion to correct the violation and deferred to the State and Federal

Governments for them to exercise their prosecutorial discretion. *See Brief of Appellant* at 20.

Prosecution, however, was not the only option that the Village had when responding to Lee's complaint. Under R.C. 4113.52(A)(1)(b), the Village was required to respond to the complaint by notifying Lee of either the efforts taken to correct the violation or the absence of the violation. A cease and desist letter sent to CYT with a copy to Lee sent timely under the statute also likely would have satisfied the Village's duty to respond under the statute. The Village also had the authority to stop providing water to CYT until CYT stopped poisoning the Village's drinking water. These are just two alternatives to prosecution that demonstrate options were available to the Village besides prosecuting CYT. Thus, the Village's argument about a conflict between the whistleblower statute and prosecutorial discretion is without merit.

The second argument the Village makes is that its statutory duty to respond to the whistleblower's report limits the scope of the whistleblower's protected activity. The duty to respond arises under R.C. 4113.52(A)(1)(b). Using a subsection of the statute aimed only at the employer's conduct to define the nature of the employee's conduct established by another subsection simply makes no sense. R.C. 4113.52(A)(1)(a) concerns the employee's conduct. R.C. 4113.52(A)(1)(b) concerns the employer's conduct, and in particular, the employer's duty to respond to a report made by an employee under subsection (a). Subsection (b) places no limits on the scope of an employee's protected activity.

Finally, the Village repeatedly argues that whistleblowing to an employer the alleged "criminal or environmental conduct of third parties" imposes liability upon the employer that was not intended by the General Assembly. *See Brief of Appellant* at 20-21.

This is a plain straw-man argument. No report imposes liability on an employer. Liability only arises from the employer's conduct.

The only liability imposed on an employer by R.C. 4113.52 occurs in R.C. 4113.52(D):

> **If an employer takes any disciplinary or retaliatory action against an employee** as a result of the employee's having filed a report under division (A) of this section, the employee may bring a civil action for appropriate injunctive relief or for the remedies set forth in division (E) of this section, or both . . . . [Emphasis added].

Obviously, no liability is imposed on an employer unless the employer disciplines or retaliates against the employee. So, regardless of whether the employee's report is protected activity, an employer has complete control (and responsibility) for any liability that might be imposed because of the report.

II. IF THIS COURT ADOPTS APPELLANT'S PROPOSITION OF LAW, THE COURT SHOULD REMAND TO THE COURT BELOW WITH INSTRUCTIONS TO RECONSIDER ITS JUDGMENT DISMISSING APPELLEE'S WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY CAUSE OF ACTION.

After finding that Lee could maintain his cause of action under R.C. 4113.52, the appellate court below held that he could not maintain a tort claim for wrongful discharge in violation of public policy. The court found that the jeopardy element of the tort claim could not be satisfied because R.C. 4113.52 "adequately protected society's interest in discouraging the wrongful conduct at issue." *Lee v. Cardington,* 5th Dist. Morrow No. 12CA0017, 2013-Ohio-3108 ¶32. Lee filed a motion with this Court for jurisdiction to

review the holding and consider Lee's Proposition of Law No. 1, but this Court has declined.

Accepting the Village's Proposition of Law No. 1 for review without accepting Lee's Proposition of Law No. 1 concerning the public policy tort claim creates the risk of this Court leaving a gap where employees complaining about environmental crimes have no protection from employment retaliation. If the Court accepts the Village's Proposition of Law No. 1, or otherwise decides that Lee's conduct was not protected by R.C. 4113.52, without further addressing the dismissal of his common law wrongful discharge claim, the state of the law will be that neither a statutory nor a common law cause of action exists for an at-will employee who suffers a retaliatory discharge for reporting an environmental crime by a third party.

Unquestionably, Ohio's public policy is to protect employees who blow the whistle on environmental crime violators. *See, e.g.,* R.C. 4113.52; *Jameson v. Am. Showa, Inc.* (1999), 2000 WL 1404 at * 11 (5th Dist. Ct. App.) ("we agree with appellant and find a source of public policy can be implicitly found in environmental laws and EPA regulations. The general public has a strong interest in being assured corporations comply with environmental laws and EPA regulations."); *Sasse v. Dept. of Labor* (2005), 409 F.3d 773, 779 (6th Cir.) ("The CAA [Clean Air Act, 42 U.S.C. 7622(a)], SWDA [Solid Waste Disposal Act, 42 U.S.C. 6971(a)], and FWPCA [Federal Water Pollution Control Act, 33 U.S.C. 1367(a)] contain whistleblower provisions, which prohibit an employer from discharging or discriminating against an employee for reporting environmental violations or instituting proceedings resulting from the administration or enforcement of the statutes.").

Denying Lee the remedies available under R.C. 4113.52, however, would mean that the statute does not provide remedies adequate to protect society's interest in discouraging the termination of employees who report environmental crimes of third parties. This case then would present facts closely analogous to *Sutton v. Tomco Machining, Inc.* (2011), 129 Ohio St. 3d 153. DeWayne Sutton was injured at work and informed his employer about the injury. Within an hour later, he was fired. Sutton filed two claims for relief: A statutory claim for unlawful retaliation under R.C. 4123.90 and a tort claim for wrongful discharge in violation of public policy. His claim under R.C.4123.90, which prohibits retaliation for an employee's filing a worker's compensation claim, failed because Sutton was fired before he could file his claim.

Sutton therefore recognized the tort claim and declared:

> [A] claim for retaliatory discharge in those circumstances is not cognizable under the statute. It is precisely this reason that Sutton's statutory claim failed. Therefore, R.C. 4123.90 plainly does nothing to discourage the wrongful conduct that Sutton alleges. Accordingly, we hold that R.C. 4123.90 does not provide adequate remedies and thus the jeopardy element is satisfied.

Sutton, 129 Ohio St. 3d at 161, ¶27.

Sutton recognized that R.C. 4123.90 established a clear public policy "prohibiting retaliatory employment action against injured employees . . . ." *Id.* at 160, ¶22. But without the tort claim being viable, a gap would exist that the legislature did not intend:

> We find that the General Assembly did not intend to leave a gap in protection during which time employers are permitted to retaliate against employees who might pursue workers' compensation benefits. The alternative interpretation—that the legislature intentionally left the gap—is at odds with the basic purpose of the antiretaliation provision, which is "to enable employees to freely exercise their rights without fear of retribution from their employers." *Coolidge v. Riverdale*

Local School Dist., 100 Ohio St.3d 141, 2003-Ohio-5357, 797 N.E.2d 61, ¶ 43.

Sutton, 129 Ohio St.3d at 160, ¶22. For the same reasons, this Court should ensure that no unintended gap is left to leave unprotected from employer retaliation those employees who protect the public by reporting environmental crimes and the other acts identified in R.C. 4113.52.

CONCLUSION

For the foregoing reasons, Amicus Curiae, the Ohio Employment Lawyers Association, urges this Court to reject Appellant Village of Cardington, Ohio's Proposition of Law No. 1 and affirm the judgment of the Fifth District Court of Appeals to the extent that court reversed the trial court's judgment dismissing Appellee Donald Lee's cause of action under R.C. 4113.52(A)(1) and (2). In the alternative, if this Court accepts Appellant's Proposition of Law No. 1 or otherwise reverses the decision of the appellate court below, this Court should remand with the instruction to vacate and reconsider the judgment dismissing Appellee's cause of action for wrongful discharge in violation of public policy.

Respectfully Submitted,

GREGORY A. GORDILLO (0063445)
VALORE & GORDILLO LLP
21055 Lorain Road
Fairview Park, Ohio 44126
Telephone: (440) 333-7330
Facsimile: (440) 333-7576
ggordillo@vglawyer.com
(per telephone authority)

Counsel for Amicus Curiae, the Ohio Employment Lawyers Association

FREDERICK M. GITTES (0031444)
THE GITTES LAW GROUP
723 Oak Street
Columbus, Ohio 43205
Telephone: (614) 222-4735
Facsimile: (614) 221-9655
fgittes@gitteslaw.com

Counsel for Amicus Curiae, the Ohio Employment Lawyers Association

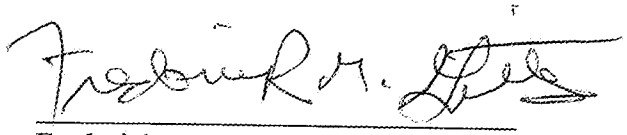
CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Amicus Curiae Ohio Employment Lawyers Association was served by regular U.S. Mail this April 29, 2014 on:

Michael S. Kolman and D. Wesley Newhouse
Newhouse, Prophater, Letcher & Moots, LLC
5025 Arlington Centre Blvd., Suite 400
Attorneys for Appellee, Donald Lee

and

John D. Latchney
Tomino & Latchney, LLC, LPA
803 East Washington Street, Suite 200
Medina, Ohio 44256
Attorney for Appellant, Village of Cardington, Ohio



Frederick M. Gittes (0031444)