[Cite as *Desmond v. Mahoning Cty. Prosecutor's Office*, 2019-Ohio-4946.]

IN THE COURT OF APPEALS OF OHIO
SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

Martin Desmond

Appellant

v.

Mahoning County Prosecutor's Office

Appellee

Court of Appeals No. 2018 MA 0109

Trial Court No. 2017 CV 02675

DECISION AND JUDGMENT

Decided: November 27, 2019

* * * * *

This case is before the court upon a motion to certify a conflict, filed by defendant-appellee, the Mahoning County Prosecutor's Office ("the prosecutor's office"). Plaintiff-appellant, Martin Desmond, filed a response brief, and the prosecutor's office filed a reply brief in support of its motion.

The prosecutor's office contends that there exists a conflict between our judgment and the judgment of the Tenth District Court of Appeals in *Haddox v. Ohio Atty. Gen.*, 10th Dist. Franklin No. 07AP-857, 2008-Ohio-4355. Because we conclude that our

judgment did not involve the same question as *Haddox* and did not set forth a rule of law that conflicts with *Haddox,* we find the motion of the prosecutor's office not well-taken.

I. Background

Desmond was employed as an assistant prosecuting attorney with the Mahoning County prosecutor's office until April 5, 2017, when the elected prosecutor, Paul Gains, terminated his employment. Desmond claims that his employment was terminated in retaliation for making a report against a co-worker under R.C. 124.341, Ohio's whistleblower statute.

Desmond appealed the decision to terminate his employment to the State Personnel Board of Review ("SPBR"). SPBR dismissed his appeal for lack of jurisdiction. It found, inter alia, that the whistleblower statute includes a good-faith requirement, and it concluded that the content and context of Desmond's report make clear that it was not made in good faith because (1) Desmond had knowledge of his co-worker's alleged misconduct for approximately ten months before reporting it to his supervisors; (2) he had months to prepare a written report, but did not do so until after his supervisors were already aware of the alleged misconduct; and (3) he made his report only after his supervisors ordered him to submit a written report.

Desmond appealed SPBR's decision to the Mahoning County Court of Common Pleas. The trial court affirmed, and Desmond appealed to this court. In a decision released on October 3, 2019, we reversed. *Desmond v. Mahoning Cty. Prosecutor's Office*, 2019-Ohio-4282, -- N.E.3d -- (7th Dist.). We found that SPBR misinterpreted

R.C. 124.341 when it dismissed Desmond's case for lack of jurisdiction. We explained that under R.C. 124.341, an employee seeking to establish that his or her employer's action was in retaliation for a whistleblower activity must show that he or she (1) filed a written report, (2) with his or her supervisor, appointing authority, state inspector general, or other appropriate legal official, (3) that identifies "a violation of state or federal statutes, rules, or regulations, or the misuse of public resources." Given that R.C. 124.341 provides no time frame for making a report, contains no requirement that a supervisor be unaware of the conduct reported, and does not specify that the protections of the statute will be lost if an employee is directed by his employer to make a report, we held that the SPBR imposed additional requirements upon Desmond not contained in the statute.

The prosecutor's office now moves this court to certify a conflict between our decision and the decision of the Tenth District Court of Appeals in *Haddox,* 10th Dist. Franklin No. 07AP-857, 2008-Ohio-4355. It proposes the following conflict question:

> Is there a good-faith requirement, pursuant to which the content and the context of a written report must be considered to establish a R.C. 124.341 whistle-blower claim?

II. Legal Standard

Section 3(B)(4), Article IV of the Ohio Constitution provides that, "[w]henever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of

appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." The Ohio Supreme Court has explained that three conditions must be met before certifying a case under Section 3(B)(4), Article IV of the Ohio Constitution: (1) "the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be 'upon the same question'"; (2) "the alleged conflict must be on a rule of law—not facts"; and (3) "the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals." (Emphasis omitted.) *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

III. *Haddox v. Ohio Attorney General*

The prosecutor's office insists that our decision is in conflict with *Haddox.* In *Haddox*, the plaintiff was an assistant attorney general ("AAG") who, in addition to her duties to represent the attorney general's office ("AGO") in workers' compensation matters, also had supervisory responsibilities for subordinate attorneys. Haddox became displeased with the performance of one of her employees (Pinkerton), and she reported this to her immediate supervisor (Barnes).

In particular, Haddox questioned the legitimacy of Pinkerton's accrual of compensatory time. Haddox met with Pinkerton about this in early October 2005. In late October 2005, Barnes submitted an internal report to AGO auditors that detailed employee hours and accrual of compensatory time. Pinkerton's name was omitted from

the report. Haddox believed that the omission was intentional. She told a former AAG, who told the chief counsel for the AAG, who then reported the information to the AGO's in-house counsel.

Chief counsel met with Haddox and Barnes. Barnes blamed his secretary for the omission; Haddox remained silent. After Barnes left, Haddox told chief counsel that even after she informed Barnes of the omission, he did not change it. Chief counsel spoke with Barnes's secretary who said that the omission of Pinkerton from the report was an oversight that had been corrected. Soon thereafter, chief counsel met alone with Barnes. Barnes expressed criticism of Haddox's management style and a desire not to work with her anymore.

Chief counsel met with the AGO's human resources director who advised that Haddox had been disciplined in the past on multiple occasions. It was decided that Barnes and Haddox should be separated, and because Barnes had seniority, Haddox should be the one transferred. Haddox was permitted to choose the division to which she would be transferred. In the meantime, an investigator from the Ohio Bureau of Criminal Identification was assigned to investigate Haddox's claims about the internal report submitted to the auditor. After interviewing numerous witnesses and reviewing pertinent documents, he was unable to substantiate Haddox's claims.

Haddox appealed her transfer to SPBR. The AGO moved to dismiss the appeal on the grounds that Haddox failed to meet the written-report requirement of R.C. 124.341(A), therefore, SPBR lacked subject-matter jurisdiction. The ALJ agreed with

the AGO and recommended that Haddox's appeal be dismissed. The ALJ reasoned that while Haddox had submitted emails expressing her dissatisfaction with Pinkerton, those emails simply evidenced her activities and responsibilities as Pinkerton's supervisor. SPBR followed the ALJ's recommendation. Haddox appealed to the Franklin County Court of Common Pleas, which affirmed SPBR's order. Haddox appealed to the Tenth District Court of Appeals.

Pertinent to the present motion, the Tenth District considered the question: "[C]an an employee whose normal duties encompass supervisory responsibilities, including the duties to investigate and report personnel issues, seek protection under R.C. 124.341 for written disclosures made in connection with the performance of those duties." *Haddox*, 10th Dist. Franklin No. 07AP-857, 2008-Ohio-4355, at ¶ 19. It concluded that she could not.

The court began by determining whether Haddox's written disclosures sufficed under R.C. 124.341. Those written disclosures included emails she sent to Barnes regarding Pinkerton's performance and compensation-time accrual.[1] Relying on federal case law interpreting the federal Whistleblower Protection Act, the court concluded that an employee who reports misconduct by individuals he or she supervises is simply acting within the scope of his or her normal job duties and is not entitled to whistleblower protection. The court determined that "Haddox had a direct supervisory responsibility

[1] There were additional writings that Haddox relied upon. Because those writings present issues not pertinent to this motion, we do not address those writings.

over Pinkerton, and, as such, she had a fiduciary duty to report her concerns." *Id.* at ¶ 32. It found that "by questioning the legitimacy of Pinkerton's compensation-time accrual, Haddox was merely doing what she was expected to do as a supervisor, and cannot be said to have risked her job to 'blow the whistle' for the benefit of the citizens of Ohio." *Id.*

In addition to relying on federal case law, the court was also persuaded by a Minnesota appellate court decision—*Kidwell v. Sybaritic, Inc.*, 749 N.W.2d 855 (Minn.Ct.App., 2008). *Kidwell* held that "[a]n employee does not engage in protected conduct under the whistleblower act if the employee makes a report in fulfillment of the duties of his or her job." *Id.* at 866. The court explained that this approach is "in harmony" with Minn.Stat. § 181.932's express good-faith requirement and requires courts to evaluate good faith by looking at the content of the report and the reporter's purpose for making the report. *Id.*

The Tenth District agreed with the approach set forth in *Kidwell.* It observed that R.C. 124.341 "contains a good-faith requirement, mandating the employee 'make a reasonable effort to determine the accuracy of any information reported.'" *Haddox* at ¶ 43, quoting R.C. 124.341(C). It determined that because "R.C. 124.341 requires the written report to be made in good faith, it is both reasonable and logical to look to the content in which the report was made, as well as the content of the report." *Id.* at ¶ 34. Ultimately, *Haddox* held that an employee who reports misconduct by individuals he or

she supervises is simply acting within the scope of his or her normal job duties and is not entitled to whistleblower protection.

IV. Analysis

The prosecutor's office contends that our judgment conflicts with *Haddox* because we "reached the exact opposite judgment about whether a good-faith requirement exists" and instead held that "the 'content and context' of [a written] report is irrelevant to establishing a violation" of R.C. 124.341. It argues that our decision presents a direct conflict with *Haddox.*

As an initial matter, the Tenth District's reasoning in *Haddox* has, in large part, been undermined by 2012 amendments to the federal Whistleblower Protection Act. Under those amendments, the federal whistleblower statute now explicitly provides that "an employee is not excluded from whistleblower protection simply because her 'disclosure is made during the normal course of duties.'" *Balko v. Ukrainian Nat. Fed. Credit Union*, 2014 WL 1377580, *18 (Mar. 28, 2014), report and recommendation adopted sub nom. *Balko v. Ukrainian Natl. Fed. Credit Union*, 2014 WL 12543813 (June 10, 2014), quoting 5 U.S.C. § 2302(f)(2).[2]

We also observe that unlike the Minnesota statute at issue in *Kidwell*—which contains an *express* good-faith requirement—there is no express good-faith requirement

[2] Although not pertinent to the issue presented in *Haddox*, the statute now also provides that a disclosure is not excluded from protection because it "revealed information that had been previously disclosed." 5 U.S.C. § 2302(f)(1)(B).

contained in R.C. 124.341, except "that it requires the employee 'to make a make a reasonable effort to determine the accuracy of any information reported.'" *Desmond,* 2019-Ohio-4282, -- N.E.3d --, at ¶ 51, quoting R.C. 124.341(C). Notably, on this point, the *Haddox* decision and our decision are actually in accord. *Haddox* at ¶ 43, quoting R.C. 124.341(C) (R.C. 124.341 "contains a good-faith requirement mandating the employee 'make a reasonable effort to determine the accuracy of any information reported.'").

Moreover, to the extent that the prosecutor's office contends that this court held that "the 'content and context' of [a written] report is irrelevant to establishing a violation," we clarify, first, that our decision addressed only the SPBR's dismissal of Desmond's appeal on *jurisdictional* grounds—the issue of whether Desmond "establish[ed] a violation" was not before the court. Second, it can hardly be said that this court ignored the content or the context of Desmond's January 2017 memo. We discussed both at length in our 27-page decision.

In any event, we find that no certifiable conflict exists between *Haddox* and our judgment in Desmond's appeal because the two cases did not present the same question or create conflicting rules of law.

The question addressed by the Tenth District in *Haddox* was whether an employee may invoke the jurisdiction of the SPBR under R.C. 124.341 where he or she discloses a violation of state or federal statutes, rules, or regulations by a subordinate as part of his or her normal supervisory responsibilities. The rule of law that emerged in *Haddox*—which

is of questionable precedential value given its reliance on case law interpreting federal statutes that have since been amended—is that a supervisor who reports the misconduct of a subordinate as part of her normal supervisory duties may not invoke SPBR's jurisdiction and receive whistleblower protection for those disclosures.

The question we addressed in Desmond's appeal is whether SPBR's jurisdiction is defeated—and the protections afforded by R.C. 124.341 lost—where (1) the employee does not immediately report the alleged violations; (2) the supervisor is already aware of the allegations; or (3) the written report is submitted at the direction of the supervisor. The rule of law that emerged from our decision is that under the plain language of R.C. 124.341, these are not proper bases for the SPBR to dismiss a whistleblower appeal for lack of jurisdiction.

Because *Haddox* and Desmond's appeal did not involve the same question and did not create conflicting rules of law, we find no certifiable conflict. We deny the motion of the prosecutor's office to certify a conflict.

V. Conclusion

The Tenth District's judgment in *Haddox* and our judgment in Desmond's appeal did not involve the same question and did not create conflicting rules of law. *Haddox* addressed whether an employee may invoke the jurisdiction of the SPBR under R.C. 124.341 where he or she discloses a violation of state or federal statutes, rules, or regulations by a subordinate as part of his or her normal supervisory responsibilities. Our decision addressed whether the jurisdiction of the SPBR may be invoked where the

employee does not immediately report the alleged violations, the supervisor is already aware of the allegations, or the written report is submitted at the direction of the supervisor. The rules of law that emerged from the two judgments are not in conflict.

Accordingly, we deny the motion of the prosecutor's office to certify a conflict. The prosecutor's office is responsible for the costs of this motion.

It is so ordered.

JUDGE ARLENE SINGER
SIXTH DISTRICT COURT OF APPEALS,
SITTING BY ASSIGNMENT

JUDGE THOMAS J. OSOWIK
SIXTH DISTRICT COURT OF APPEALS,
SITTING BY ASSIGNMENT

PRESIDING JUDGE CHRISTINE E. MAYLE
SIXTH DISTRICT COURT OF APPEALS,
SITTING BY ASSIGNMENT

NOTICE TO COUNSEL

This document constitutes a final judgment entry.