



OHIO ALLIANCE FOR CIVIL JUSTICE



NOVEMBER 12, 2019

HOUSE CIVIL JUSTICE COMMITTEE

HOUSE BILL 238 – OPPONENT TESTIMONY

Chairman Hambley, Vice Chair Patton, Ranking Member Brown and members of the Ohio House Civil Justice Committee, thank you for the opportunity to testify on behalf of the Ohio Alliance for Civil Justice. Since 1987, The Ohio Alliance for Civil Justice's broad-based coalition has supported many Ohio trade and professional associations, small and large businesses, medical groups, farmers and others. The purpose of the Alliance is to help promote a healthy economic climate in Ohio by stopping lawsuit abuse, and to promote a common-sense civil justice system in the state.

INTRODUCTION

This committee is considering changes to two "whistleblower" laws, R.C. 124.341 and R.C. 4113.52. The proposed amendments go beyond what is needed to rectify perceived problems with these statutes, as suggested by proponents and reported in the media. The following comments from the Ohio Alliance for Civil Justice will highlight three main points:

- The purpose of the whistleblower laws, as written, was not to duplicate remedies already available to employees in other parts of the Revised Code or under common law. They were codified to discourage employers from engaging in criminal acts that could cause great harm, such as dumping chemicals or disregarding safety standards, both of which are examples of conduct that can result in criminal prosecution.
- The currently proposed changes to these whistleblower statutes applicable to public employers place an undue burden on Ohio's taxpayers, and there are existing or less costly remedies to redress perceived problems shortcomings in the statutes.
- While there may be reasons to clarify the statutes and provide employees with increased protections for reporting gross misconduct rather than just criminal misconduct, the proposed language creates ambiguity that could result in costly lawsuits and unintended consequences.

The Ohio Alliance for Civil Justice supports amendments that are (1) fair to employers and employees, (2) do not impose undue burdens on employers who have not engaged in egregious or criminal conduct, and (3) are clear and unambiguous on their face.

1. **R.C. 4113.52 IS A SPECIFIC STATUTE WITH A NARROW INTENT, BUT IT IS ONLY ONE REMEDY AVAILABLE TO EMPLOYEES**

In 2012, the 10th District Court of Appeals considered a case called *Blackburn v. American Dental Centers*, in which the Court had to decide whether the whistleblower statute covered only conduct by an employer that the employee knew to be criminal in nature. The relevant wording of the statute states:

*(3) 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** if the employee reasonably believes that the violation either 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 or is a felony, ...*

In holding that the highlighted “and” specifically meant that only conduct that is criminal in nature can be reported under this particular law and provide an aggrieved employee with a remedy, the Court of Appeals also noted that this interpretation was consistent with a line of earlier precedential cases.

The *Blackburn* plaintiffs had other avenues for relief through common-law tort claims, including through a claim for wrongful discharge in violation of a clear public policy, which does not require proof of criminal wrongdoing. The plaintiffs failed to make that type of claim because they were unable to cite to a recognized source of public policy. Allowing the plaintiffs to prevail on such a claim in the absence of a public policy to support it would have meant disregarding 30 years' worth of Ohio case law.

The purpose of creating the strict reporting mechanism of R.C. 4113.52 was not to re-create or duplicate other anti-retaliation measures available to plaintiffs, but rather to single out protection for reporting the most egregious types of misconduct. Another purpose of this law's specificity was to clearly set expectations and obligations for the employee and the employer. The classic scenario is the employer who refuses to remedy the toxic chemical spill behind the building when the employee says this is creating a risk of harm and constitutes a crime under various environmental laws. The threat to an employer that chooses to thumb its nose at this employee warning is a costly lawsuit and bad publicity. The existing statute already covers wrongdoing that is prohibited by “...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”, with the only limitation being that the employee reasonably believes that this violation is a criminal offense likely to cause imminent physical harm to others or that it is a felony.

Employees are already able to sue employers for retaliation if they are adversely affected for engaging in a wide range of protected activity, such as:

- Exercising their rights under labor relations laws;
- Filing a complaint with Human Resources, the Ohio Civil Rights Commission, or the Equal Employment Opportunity Commission;
- Hiring a lawyer to discuss employment claims;
- Filing a workers' compensation claim or a disability claim;
- Complaining internally or to the Department of Labor about minimum wages, overtime, or equal-pay practices; and
- Not being reinstated when returning from a family medical leave or a military leave.

There are many other such state and federal laws that protect employees' employment.

Notably, the existing whistleblower law covers all employers, regardless of size. By contrast, many other Ohio laws have a threshold that narrows the definition of "employer." For example, R.C. 4112.02, Ohio's law protecting employees from discrimination in the workplace, defines an employer as one employing 4 or more employees.

2. THE CREATION OF A PRIVATE RIGHT OF ACTION FOR PUBLIC SERVANTS DOES NOT SERVE THE STATE'S BEST INTERESTS

While the changes to R.C. 124.341 affirm the need to increase public trust, granting public servants the ability to sue the state in court -- where the original mechanism in Chapter 124 calls for an investigation by the Inspector General -- places a greater fiscal burden on the public for resultant jury verdicts or settlements. Instead of allowing experienced state investigators and prosecutors to consider reported abuse, these proposed changes ask a jury to step into these investigators' and prosecutors' shoes, to render verdicts, and even to award attorneys' fees and costs. So, not only do the taxpayers, your constituents, bear the cost of paying to remedy the alleged wrongdoing reported, but now the taxpayers also have to pay a public servant, who has a legal and moral obligation to be a watchdog for the public trust without extra compensation, for any recovery in a court case. That is not the best use of public funds.

If the concern is that employees will be afraid to report wrongdoing for fear of losing jobs, one option would be to implement an ombudsman. If the concern is that the Inspector General or prosecutors lack the independence to investigate the state, the alternatives include retaining independent investigators or special prosecutors, tools already at the disposal of the state.

3. THE PROPOSED CHANGES TO R.C. 4113.52 ARE VAGUE AND AMBIGUOUS, AND COULD CREATE UNINTENDED CONSEQUENCES

One proposed change (page 7, lines 167 and 174) adds “rule or regulation” to the list of sources that an employee can look to in deciding that an employer has engaged in misconduct. However, this change, without more, gives rise to multiple interpretations. Does this mean a single violation of a workplace rule could give rise to bringing a whistleblower claim? Could an employee sue her employer using the whistleblower statute because she believes that the handbook rule against substance abuse in the workplace was not consistently enforced? Or that the vacation policy was not consistently applied? As proposed, both of these scenarios could be covered as there is no requirement that the alleged violation result in personal injury or public harm, as the law currently requires.

There are already other remedies for this kind of employee concern, including union grievance mechanisms, internal complaints, administrative complaints, and statutory and common law claims. While it appears the goal is to expand the provisions to include rules or regulations promulgated pursuant to law, as contrasted to handbook or union rules or regulations, the fact remains that, as drafted, misconduct based on an employer’s violation of “rules or regulations” is ambiguous and overly broad.

Further, the proposal contains no requirement of a showing of harm -- the employee need only allege the violation of “a rule or regulation” to trigger the requirement that an employer investigate within 24 hours. Without any requirement of how the public or others are in danger of imminent harm, whether that harm rises to a criminal act or not, this expansion of the law could result in many unnecessary and unfounded suits, especially when fueled by the prospect of attorneys’ fees.

There are more narrowly focused ways to force corruption into sunlight. At a minimum, the employee should be required to make a good-faith showing that the employer engaged in conduct that constitutes a felony, or that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety. The focus should be on ensuring that employees who believe, in good faith, that an act is criminal, will constitute imminent or grave harm, or is fraudulent will be protected from adverse action. The changes proposed in H.B. 238 go well and unnecessarily beyond that.

CONCLUSION

The Ohio Alliance for Civil Justice opposes the proposed amendments because they go far beyond what is necessary to protect employees who report corruption or conduct perceived to be contrary to Ohio law. The proposed amendments do not even require the alleged violations to cause risk of harm to any person or the public. Instead, any alleged violation of a “rule or regulation,” whether verbal or written, triggers mandatory obligations on the part of employers. One can only imagine the impact this will have on the resources of employers, large and small.

If Ohio’s whistleblower statutes are to be amended, the OACJ advocates for specific, narrowly tailored amendments to these laws that were written with a very

specific objective in mind. These laws were never intended to limit reporting of misconduct, but they also were not intended to provide a private right of action for every perceived violation of a workplace rule, especially where other legal remedies are already available for employer violations of a non-criminal nature.

We urge consideration for the above suggestions and are willing to provide further information upon request.