

**STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW**

Trisha Norton,

*Appellant,*

v.

Case Nos. 2013-WHB-02-0076  
2013-OSH-02-0077

Madison Local School District,

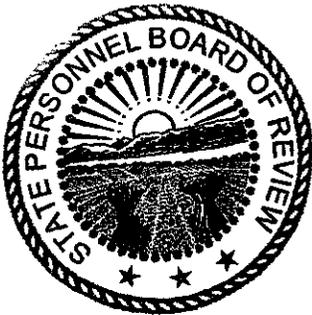
*Appellee,*

**ORDER**

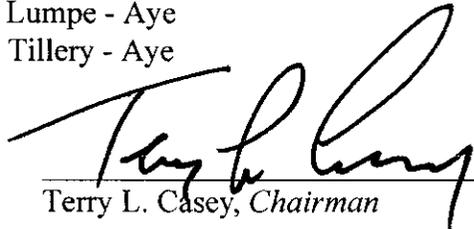
These matters came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeals.

After a thorough examination of the entirety of the records, including a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that the Appellee's motion to dismiss is **GRANTED** and the instant appeals are **DISMISSED** for lack of jurisdiction.



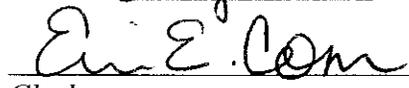
Casey - Aye  
Lumpe - Aye  
Tillery - Aye

  
\_\_\_\_\_  
Terry L. Casey, *Chairman*

**CERTIFICATION**

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitutes (~~the original~~/a true copy of the original) order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, July 17, 2014.

  
\_\_\_\_\_  
*Clerk*

**NOTE:** Please see the reverse side of this Order **or** the attachment to this Order for information regarding your appeal rights.

**STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW**

Trisha Norton

*Appellant*

v.

Madison Local School District

*Appellee*

Case Nos. 2013-WHB-02-0076  
2013-OSH-02-0077

June 3, 2014

Christopher R. Young  
*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This matter comes on for consideration due to the Appellant's filing of a whistleblower and OSHA appeals before this Board, alleging that she was constructively discharged by not having a student removed from her classroom or reassigned to a different teacher and not having a zero-tolerance policy in place within the district. On March 19, 2013, the undersigned Administrative Law Judge issued a Procedural Order and Questionnaire regarding both of the above referenced appeals to the Appellant, to be answered by April 2, 2013. On April 3, 2013, an extension of time to file responses to the Procedural Orders and Questionnaires was granted, extending the time to file the Appellant's response until April 17, 2013. On April 16, 2013, the Appellant filed her respective answers to the above noted questionnaires. On April 29, 2013, the Appellee filed their response to Appellant's questionnaire answers.

Thereafter on July 8, 2013, the Appellee filed motions to dismiss on both of the above referenced whistleblower and OSHA appeals filed by the Appellant. On July 23, 2013, an extension of time to file the Appellant's responses to Appellee's motions to dismiss and the Appellant filed responses on August 12, 2013.

For clarification, the incident question involved a student at its Madison Adult Career Center in the district who had a student-to-student discussion regarding a "dream" about causing harm to the Appellant herein that occurred January 10, 2013, that she became aware of on January 11, 2013. In the pleadings contained within the file, the evidence reveals that the employee was actually never threatened, as she learned of this discussion secondhand from other students in the class. After this was revealed to the employee, the matter was promptly investigated

by school officials and local law enforcement. Local law enforcement concluded that no criminal conduct had occurred and the district removed the student from the class for significant period of time and placed him on probation, cautioned him about his future conduct and he apologized for his comments. Further, the evidence revealed that the Appellant, through no actions taken on behalf of the Appellee, refused to come back to work after March 4, 2013. While the Appellee understands that workplace violence certainly does occur, and would like to eliminate such acts, what more could they have done regarding a student dreams, which they have no control over. The Appellee herein asserts that there was no risk of death, or serious injury, nor was there imminent danger of death or serious harm. Furthermore, the Appellee contends that the law is clear that the Appellant must "reasonably believe" that there is an intimate danger of death or serious harm, and by no objective standard has that been met in this case. Thus, there is no merit to her complaints and that they should be dismissed.

In a "whistleblower" appeal, the burden of proof remains at all times with Appellant. *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 253, citing *Board of Trustees of Keene State College v. Sweeney* (1978), 429 U.S. 24, 25, n.2., 29. Additionally, Appellant bears the burden of production to establish, by a preponderance of the evidence, the existence of the elements of its *prima facie* case, *supra*, at 252-253; which are as follows:

Appellant must establish that he complied with the requirements of R.C. 124.341 by filing a written report with either his/her supervisor, appointing authority, or other appropriate official named in that statute, alleging a violation of state or federal statutes, rules, regulations or the misuse of public resources.

Appellant must then establish that after he filed such report, the appointing authority took disciplinary or retaliatory action against her as a result of Appellant having filed the report under R.C. 124.341(A) (*i.e.*, a causal relationship). See, *McDonnell Douglas Corp. v. Green* (1973), 422 U.S. 792, 802; *Melchi v. Burns International Security Services, Inc.*, 597 F. Supp. 582 (E.D. Mich., N.D. 1984); *Canino v. EEOC*, 707 F.2d 468, 471 (9th Cir. 1983); *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982); *Burris v. United Telephone Co. of Kansas, Inc.*, 683 F.2d 339, 343 (10th Cir. 1982); *Hopkins v. City of Midland*, 158 Mich. App. 361, 378 (1987); *Tyrna v. Adano, Inc.*, 159 Mich. App. 592, 601 (1987).

Further, with respect to the whistleblower statute Ohio Revised Code Section 124.341 which states in pertinent part:

(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.

(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 or filing a complaint as authorized by division (A) of this section, including, without limitation, doing any of the following:

- (1) Removing or suspending the employee from employment;
- (2) Withholding from the employee salary increases or employee benefits to which the employee is otherwise entitled;
- (3) Transferring or reassigning the employee;
- (4) Denying the employee promotion that otherwise would have been received;
- (5) Reducing the employee in pay or position.

What is revealed by the reading of the above whistleblower statute is that in order for an Appellant to invoke whistleblower protection, the Appellee has to invoke an adverse employment action against the Appellant to include, but not without limitation, Ohio Administrative Code Section 124.341 (1) through (5). Clearly, in the case at bar, the Appellant simply did not return to work after March 4, 2013, as no disciplinary action was taken in any manner against the Appellant. Further, the statute does not contemplate constructive discharge, nor has Appellant met the existence of the elements of a *prima facie* case, nor are there any issues of genuine facts for this Board to consider.

In an "OSHA" appeal not falling under the purview of Revised Code Section 124.34, the burden of proof remains at all times with the Appellant (R.C.

4167.13(B)(1), as well. Additionally, the Appellant bears the burden of production to establish, by a preponderance of the evidence, the existence of the elements of Appellant's *prima facie* case.

Likewise with respect to the OSHA statute Ohio Revised Code Section 4167.13 which prohibits retaliation by an employer, states in pertinent part:

(A) No public employer shall discharge or in any manner discriminate against any public employee because the public employee, in good faith, files any complaint or institutes any proceeding under or related to this chapter, or testifies or is about to testify in any proceeding, or because of the exercise by the public employee, on his own behalf or on the behalf of others, of any right afforded under this chapter.

(B) Any public employee who believes he has been discharged or otherwise discriminated against by any public employer in violation of division (A) of this section may elect any one of the following remedies:

(1) File, within sixty days after the violation occurs, a complaint with the state personnel board of review. The state personnel board of review may restrain violations of division (A) of this section and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay and reasonable interest thereon.

(2) Pursue any grievance or appeal procedure provided for an action based upon a violation of division (A) of this section under a collective bargaining agreement entered into pursuant to Chapter 4117. of the Revised Code;

(3) Pursue any grievance or appeal procedure provided for an action based upon a violation of division (A) of this section under a municipal or county charter;

(4) Pursue any grievance or appeal procedure provided for an action based upon a violation of division (A) of this section under section 124.34 of the Revised Code;

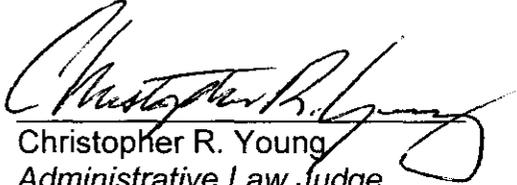
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(5) Pursue any grievance or appeal procedure provided for an action based upon a violation of division (A) of this section under any other grievance or appeal procedure or any other right or remedy provided by law.

Again, what is revealed by the reading of the above OSHA statute is that in order for an Appellant to invoke the OSHA statute and its protections, the Appellee has to invoke an adverse employment action and/or discriminate against the Appellant. Clearly, in the case at bar, the Appellant simply did not return to work after March 4, 2013, as no disciplinary action was taken in any manner against the Appellant, nor was she discriminated against, nor did she allege any of the above. Thus, the Appellant has not met the existence of the elements of a *prima facie* case, nor are there any issues of genuine facts.

Therefore, I respectfully **RECOMMEND** that the instant appeals be **DISMISSED** for lack of jurisdiction and the Appellee's motion to dismiss the above referenced appeals be **GRANTED**.

  
Christopher R. Young  
Administrative Law Judge