

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

XIAOBING XI,	:	APPEAL NO. C-090296
Plaintiff-Appellant,	:	TRIAL NO. A-0706004
vs.	:	<i>JUDGMENT ENTRY.</i>
THE PROCTER & GAMBLE COMPANY,	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar. This judgment entry is not an opinion of the court.¹

Raising a single assignment of error, plaintiff-appellant Xiaobing Xi appeals from the entry of summary judgment for defendant-appellee, The Procter & Gamble Company, on Xi's claims for wrongful discharge in violation of public policy and in violation of R.C. 4113.52, Ohio's whistleblower statute.

Xi began his employment with P&G in 1991. After working in several areas of the company, Xi transferred to the purchasing department where he coordinated the purchase of Swiffer home-cleaning products from suppliers. One supplier was Winsorton, a minority-owned company that imports Swiffer products from China. In addition to receiving parts for a successful product line from Winsorton, P&G benefited from the relationship because Winsorton qualified as a "minority spend."

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

P&G's purchases from Winsorton counted towards P&G's goal of promoting corporate diversity spending.

On October 30, 2006, P&G terminated Xi's employment because of his poor overall performance and because of his failure to make progress under a May 2006 improvement plan. Xi maintained that P&G illegally terminated his employment because of his repeated reports to his P&G supervisors that the Winsorton relationship cost the company money and was maintained for the primary purpose of demonstrating compliance with federal minority-business-enterprise guidelines for government contractors.

Because summary judgment presents only questions of law, we review the entry of summary judgment de novo, without deference to the trial court's determinations.² Summary judgment is proper pursuant to Civ.R. 56(C) when (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and with the evidence viewed most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.³

When, as here, the party moving for summary judgment discharges its initial burden to identify the absence of genuine issues of material fact on an essential element of the nonmoving party's claims, the nonmoving party then has a reciprocal burden of specificity and cannot rest on the allegations or denials in the pleadings, but must set forth "specific facts," by the means listed in Civ.R. 56(C) and (E), showing that triable issues of fact exist.⁴

² See *Polen v. Baker*, 92 Ohio St.3d 563, 564-565, 2001-Ohio-1286, 752 N.E.2d 258.

³ See, also, *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264.

⁴ See id. at 293, 1996-Ohio-107, 662 N.E.2d 264.

Xi first contends that the trial court erred in entering summary judgment for P&G on his claim that P&G had terminated him in violation of Ohio's whistleblower statute. That statute protects an employee from discipline or retaliatory action by his employer when the employee, in the course of his employment, becomes aware of and reports a legal violation that the employer has the authority to correct, and when the employee reasonably believes that the violation is either a criminal offense that is likely to cause an imminent risk of physical harm or a hazard to public health or safety, or a felony.⁵

But the employee is protected only under the following circumstances: (1) the employee provided oral notification of the violation to the employee's supervisor or other responsible officer of the employer; (2) the employee subsequently filed with *that* supervisor a written report that provided sufficient detail to identify the violation; and (3) the employer failed to correct the violation or to make a reasonable and good-faith effort to correct the violation.⁶ To be afforded protection as a whistleblower, an employee must strictly comply with the mandates of R.C. 4113.52.⁷

Even after construing the evidence in this case most strongly in Xi's favor, we conclude that the activity Xi reported was not illegal activity, and that Xi had failed to provide a written report describing, in any detail, that activity to the same supervisor to whom he claims he had made an oral report.

Since 2003, Xi had communicated his reservations that Winsorton was overcharging P&G. But while Xi adamantly questioned the wisdom of P&G's decision to employ Winsorton as another layer in its Swiffer supply chain, Xi admitted to his supervisors and to Icy Williams, P&G's corporate supply diversity leader, that the

⁵ See R.C. 4113.52(A)(1)(a); see, also, *Abrams v. Am. Computer Technology*, 168 Ohio App.3d 362, 2006-Ohio-4032, 860 N.E.2d 123, ¶34.

⁶ See *Contreras v. Ferro Corp.* (1995), 73 Ohio St.3d 244, 248-249, 652 N.E.2d 940; see, also, *Abrams v. Am. Computer Technology* at ¶35.

⁷ *Abrams v. Am. Computer Technology* at ¶40, citing *Contreras v. Ferro Corp.*, syllabus.

company's decision was not illegal. He never denied that Winsorton was a legitimate minority-owned supplier that had been certified by the National Minority Supplier Development Council and held certified by P&G's own in-house review. While P&G might have been overpaying Winsorton to advance its goal of having its supply base reflect the diversity of its consumers, there was no evidence that Winsorton was not, in fact, a minority-owned business.

Where the alleged illegal activity appears to be “more related to [the employee's] problems with management” than to the reporting of illegal activity, the employee's report of that activity can be construed as an internal management dispute, and the asserted wrongdoing is insufficient to gain the protections of the whistleblower statute.⁸ Since Xi did not demonstrate any illegal activity by P&G, he could not have been afforded the protections of the whistleblower statute.⁹

Moreover, Xi's whistleblower claim also fails because he did not comply with the reporting requirements of the whistleblower statute. First, even if we assume, for purposes of argument only, that Xi had properly made an oral report of legally proscribed activity to Williams in early 2006, he did not subsequently file with *her* a written report detailing the alleged violations. Xi admitted that he made his written report detailing alleged wrongdoing not, as is required by the statute,¹⁰ to Williams, but to his supervisor, Wade Shih.

The written report to Shih also failed to provide sufficient detail to identify an actionable violation or to alert P&G to correct it. In fact, Xi concluded the report with a recommendation to “continue the Winsorton arrangement given the small amount of cost

⁸ *Haney v. Chrysler Corp.* (1997), 121 Ohio App.3d 137, 139, 699 N.E.2d 121; see, also, Cavico, Private Sector Whistleblowing and the Employment-At-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis (2004), 45 S.Tex.L.Rev. 543, 565.

⁹ See *Anders v. Specialty Chem. Resources, Inc.* (1997), 121 Ohio App.3d 348, 359, 700 N.E.2d 39.

¹⁰ See *Haney v. Chrysler Corp.*, 121 Ohio App.3d at 139, 699 N.E.2d 121; see, also, *Abrams v. Am. Computer Technology* at ¶35.

and cash flow benefit.” Xi’s argument that he had been coerced to reach that conclusion was refuted by his own deposition testimony that Shih had left the decision whether to recommend staying with Winsorton up to Xi. Because we can only conclude from the evidence that Xi failed to comply with the detailed reporting requirements of the statute, he, again, could not have been afforded the protections of the whistleblower statute. Because no genuine issue of material fact remains with respect to Xi’s failure to comply with the mandates of R.C. 4113.52, the trial court properly entered summary judgment in favor of P&G on Xi’s whistleblower claim.

Xi next argues that the trial court erred in entering summary judgment because P&G had wrongfully terminated him in violation of public policy for reporting his concerns about Winsorton.

An at-will employee like Xi may be terminated without reason, so long as the termination is not contrary to law.¹¹ An exception to the employment-at-will doctrine exists where a termination is contrary to the clear public policy of Ohio.¹²

To prove wrongful termination in violation of public policy, a plaintiff must demonstrate four elements: (1) that a clear public policy existed and was manifested in a state or federal constitution, in a statute or administrative regulation, or in the common law (the clarity element); (2) that dismissing employees under circumstances like those involved in the plaintiff’s dismissal would jeopardize the public policy (the jeopardy element); (3) that the plaintiff’s dismissal was motivated by conduct related to the public policy (the causation element); and (4) that the employer lacked an overriding legitimate

¹¹ See *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 483 N.E.2d 150, paragraph one of the syllabus.

¹² See *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228, 551 N.E.2d 981, paragraph two of the syllabus.

business justification for the dismissal (the overriding-justification element).¹³ The clarity and jeopardy elements pose questions of law that are to be determined by the court.¹⁴

But a wrongful-termination claim does not survive summary judgment when the employee has not complied with the requirements of the whistleblower statute unless clear public policy itself places an affirmative duty on the employee, apart from the whistleblower statute, to report the violation, or unless clear public policy prohibits the employer from retaliation.¹⁵

Xi first argues that he was discharged in violation of public policy when he refused to participate in conduct that amounted to common-law fraud after complaining about P&G's directive to continue business dealings with Winsorton.¹⁶ While an employee who has been discharged for "refusal to participate in activities which arguably violate" a clear public policy has a claim for wrongful discharge,¹⁷ here Xi acquiesced and did participate in the activity that he claimed violated public policy.

Finally, Xi's reliance upon the federal False Claim Act as a source of public policy separate from the policy embodied in the whistleblower statute is misplaced. The Act imposes civil liability upon "any person" who "knowingly presents * * * to * * * the United States Government * * * a false or fraudulent claim for payment."¹⁸ It also bars employers from retaliating against employees who take lawful acts in furtherance of a False Claims

¹³ See *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 69-70, 1995-Ohio-135, 652 N.E.2d 653; see, also, *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, 875 N.E.2d 36, ¶18-13.

¹⁴ See *id.*

¹⁵ See *Dean v. Consol. Equities Realty #3, LLC*, 182 Ohio App.3d 725, 2009-Ohio-2480, 914 N.E.2d 1109, discretionary appeal not allowed, 123 Ohio St.2d 144, 2009-Ohio-5340, 914 N.E.2d 1064; see, also, *Hale v. Volunteers of America*, 158 Ohio App.3d 415, 2004-Ohio-4508, 816 N.E.2d 259.

¹⁶ See *Anders v. Specialty Chem. Resources, Inc.*, 121 Ohio App.3d at 355, 700 N.E.2d 39 (employee's refusal to participate in conduct involving insurance fraud and falsification of insurance claims sufficient to defeat dismissal of his wrongful-termination claim).

¹⁷ *Collins v. Rizkana*, 73 Ohio St.3d at 71, 652 N.E.2d 653.

¹⁸ See *Vermont Agency of Natural Resources v. United States ex rel. Stevens* (2000), 529 U.S. 765, 769.

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Act action.¹⁹ But since the protections under the federal act “are just a subset of the types of actions” protected by Ohio’s whistleblower statute, X’s wrongful-termination claim could not have survived summary judgment.²⁰ The assignment of error is overruled.

Therefore, the trial court’s entry of summary judgment is affirmed.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., CUNNINGHAM and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on September 29, 2010
per order of the Court _____.

Presiding Judge

¹⁹ See Section 3730(h), Title 31, U.S.Code.

²⁰ See *Gossett v. Byron Prod. Inc.* (S.D.Ohio 2005), 407 F.Supp.2d 918, 924; see, also, *Hale v. Volunteers of America.*