

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

SCOTT M. MCNAIR,

Plaintiff,

v.

MARICOPA COUNTY
DEPARTMENT OF
TRANSPORTATION, STATE OF
ARIZONA PERSONNEL BOARD,
KENNETH MEDLIN, TERRY
PETERSON, JENNIPHER RAMSEY,

Defendants.

CAUSE NO. LC 2003-000539-001-DT

(Assigned to the Honorable
Michael D. Jones)

**DEFENDANTS' MARICOPA COUNTY DEPARTMENT OF
TRANSPORTATION, MEDLIN, PETERSON & RAMSEY ANSWERING BRIEF**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

I. STATEMENT OF THE CASE 1

II. STATEMENT OF FACTS 1

III. STATEMENT OF THE ISSUES 3

IV. ARGUMENT 3

 A. Standard of review 3

**B. McNair is Unable to Satisfy any of the Requirements Set Forth
 in Arizona's Whistleblower Statute 4**

V. **CONCLUSION..... 6**

TABLE OF AUTHORITIES

Cases

Berenter v. Gallinger, 173 Ariz. 75, 839 P.2d 1120 (App. 1992) 3

Pima County v. Pima County Merit Sys. Comm'n (Mulhem), 189 Ariz. 566, 569, 944 P.2d 508, 511 (App.1997) 3

Statutes

A.R.S. § 38-531(1) 4

A.R.S. § 38-532 1, 2, 4

A.R.S. § 38-532(A) 4

A.R.S. § 38-532(B) 4

A.R.S. § 38-532(H) ..

I. STATEMENT OF THE CASE

This action is a Judicial Review of an Administrative decision of a case appealed from the State of Arizona Personnel Board, ("Board") docket number 02-056 issued on the 29th day of April 2003. The action originated by Scott McNair ("McNair") as a "Whistleblower" complaint filed under A.R.S. § 38-532.

The Board's hearing officer, Harold Merkow, concluded that this matter was within the jurisdiction of the Board but that McNair failed to meet the jurisdictional requirements of the Whistleblower statute, McNair failed to produce "documentary evidence showing that he made a disclosure to a public body before his separation from County service and [failed to] produce a document showing that he asked for a hearing to review his separation from County service within 10 days from that separation." (Appendix 6 at 9.)

The Board adopted the hearing officer's report and recommendation and dismissed McNair's complaint for lack of jurisdiction. (Appendix 7.)

II. STATEMENT OF FACTS

McNair was employed as a contract employee by Maricopa County in its Department of Transportation ("MCDOT") from October 12, 2000 until June 30, 2002. (Appendix 1, 2 and 3.)

McNair had two contracts of employment. The first contract term was from October 12, 2000 through June 30, 2001. (Appendix 1.) The second contract term was from July 1, 2001 through June 29, 2002. (Appendix 2.) Both contracts clearly stated that McNair was a contract employee subject to

termination without cause upon written notice from the appointing authority of the hiring department. *Id.* Each contract also stated that the term of the contract would be to the end of the fiscal year¹ unless "renewed by written agreement at the beginning of each fiscal year." *Id.*

McNair's employment contract was allowed to automatically expire on June 29, 2002. (Appendix 3.)

Following the expiration of his employment contract, McNair, on July 17, 2002, e-mailed a complaint to eight County employees and the County Board of Supervisors alleging inappropriate behavior by several employees of MCDOT. (Appendix 4, "E-Mailed Complaint.")

On September 6, 2002, McNair mailed a written complaint to Diane Weikamp. At that time, Weikamp was employed in the Maricopa County Human Resources Department as an Employee Relations Specialist. (Appendix 5).

On December 30, 2002, McNair filed an appeal with the State of Arizona Personnel Board pursuant to A.R.S. § 38-532.

Hearing Officer Merkow found that McNair failed to meet the jurisdictional requirements of the Whistleblower statute because McNair did not submit a written complaint to a public body prior to the expiration of his contract and McNair failed to submit a written request for a hearing within 10 days from his separation from Maricopa County. (Appendix 6 at 7, ¶¶ 3,4.)

¹ Maricopa County's fiscal year begins on July 1 and ends on June 30.

The Hearing officer concluded that McNair was:

Not entitled to a hearing before the Arizona state Personnel Board to review the circumstances of his separation from Maricopa County or to consider whether McNair's separation from Maricopa County was as a result of a prohibited personnel practice.

(Appendix 6 at 7, ¶ 5.)

On April 29, 2003, the Hearing Officer's report and recommendations were adopted by the Arizona State Personnel Board. (Appendix 7.)

III. **STATEMENT OF THE ISSUES**

- A. Did McNair comply with the jurisdictional requirements of Arizona's whistleblower statute?
- B. Did the Board correctly find that McNair's complaint was insufficient, untimely and did not satisfy the jurisdictional requirements of Arizona's whistleblower statute?

IV. **ARGUMENT**

A. **Standard of review**

In reviewing the Arizona Personnel Board's action, the Superior Court's role is to determine whether the Board acted illegally, arbitrarily, capriciously, or whether it abused its discretion. See *Pima County v. Pima County Merit Sys. Comm'n (Mulhern)*, 189 Ariz. 566, 569, 944 P.2d 508, 511 (App.1997). To make such a determination, the Court must decide whether substantial evidence exists to support the Board's findings. Whether substantial evidence supports the Board's findings is a question of law to be determined independently by the Court. *Id.*, *Berenter v. Gallinger*, 173 Ariz. 75, 839 P.2d 1120 (App. 1992).

B. McNair is Unable to Satisfy any of the Requirements Set Forth in Arizona's Whistleblower Statute.

McNair is unable to satisfy any of the requirements set forth in A.R.S. § 38-532 concerning whistleblower complaints. Specifically, McNair has failed to provide any evidence that he submitted anything in writing to the appropriate entity or person **prior** to his employment contract expiring on June 29, 2002. (Appendix 2, 4.) McNair also failed to provide any evidence that his contract was terminated because he disclosed information that was considered to be a matter of public concern. A.R.S. § 38-532(A). Since McNair cannot show he filed a written complaint with a public body as required by A.R.S. § 38-532(B) prior to his termination of employment, his claim must be dismissed.

Secondly, McNair was employed on a contract basis and not in a regular status position. As a contract employee, McNair is unable to satisfy the statutory definition of employee. Specifically, A.R.S. § 38-531(1) defines employee as follows:

Employee means an officer or employee of this state or any of its departments, commissions, agencies or boards. Employee includes employees and officers of community college districts, school districts and counties of this state but does not include officers or employees of a municipal corporation established for the purpose of reclamation and distribution of water and the generation of electricity.

McNair has never been an employee of Maricopa County. -Consequently as a former contract employee, McNair has no authority to bring a whistleblower complaint under A.R.S. § 38-352.

Finally, McNair failed to file a written claim within ten days of the effective date of his termination (June 29, 2002) as required by A.R.S. § 38-532(H). The only evidence presented on this issue was a complaint submitted to the Board of Supervisors on July 17, 2002. In addition, this complaint only addressed issues regarding Title VII harassment and retaliation. (Appendix 5.)

In summary, McNair's complaint that he is a whistleblower is flawed in the following ways:

1. McNair does not have standing as a former contract employee to bring such a complaint;
2. McNair is unable to show that he submitted a written complaint which addressed a matter of public concern and as a result Maricopa County dismissed him from employment; and,
3. McNair failed to file a written claim within 10 days after his contract of employment was allowed to expire.

V. CONCLUSION

WHEREFORE, Defendants ask this Court to uphold the State Personnel Board's decision dated April 29, 2003; issue an order dismissing this appeal and award Defendants their attorney's fees.

RESPECTFULLY SUBMITTED this 30th day of April 2004.

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ORIGINAL of the foregoing FILED
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30th day of April 2004 to:

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