**[Cite as *State ex rel. Kurt v. Cleveland*, 2010-Ohio-5019.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 94999**

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## STATE OF OHIO, EX REL. PAMELA D. KURT

RELATOR

vs.

## CITY OF CLEVELAND, ET AL.

RESPONDENTS

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**JUDGMENT:**
**WRIT DENIED**

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Writ of Mandamus
Motion No. 434323
Order No. 436939

**RELEASE DATE:** October 8, 2010

**ATTORNEY FOR RELATOR**

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**ATTORNEYS FOR RESPONDENT**

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MELODY J. STEWART, J.:

**{¶ 1}** Pamela D. Kurt has filed a complaint for a writ of mandamus seeking to compel the city of Cleveland and the city of Cleveland, Department of Community Relations, (collectively the "City"), to reinstate her as an employee and to recover back-pay, benefits, interest, attorney fees, and costs. The City has filed a motion for summary judgment, which we grant for the following reasons.

## I. Facts

**{¶ 2}** On July 17, 2006, Kurt was employed by the City as the Fair Housing Administrator. At the time of her employment, the City required all of its employees to reside in the City within six months of the date of hire and continue to reside within the City during their period of employment as required by §74 of the Cleveland Charter. In August of 2007, the Cleveland Civil Service Commission, ("Commission"), received information that Kurt did not reside within the City, but actually resided in the city of Willoughby Hills, Ohio. On August 30, 2007, the Commission sent Kurt a residency compliance letter which indicated that she had seven working days to prove residency within the City.

**{¶ 3}** On September 4, 2007, Kurt sent the Commission a letter challenging the City's residency law. On February 25, 2008, a residency hearing, that Kurt did not attend, was conducted by a referee of the Commission. The referee determined that Kurt was not a resident of the City, which resulted in Kurt's termination from her position as the Fair Housing Administrator on March 14, 2008.

**{¶ 4}** Kurt appealed her termination to the Commission. On April 25, 2008, following a hearing, the Commission voted to uphold Kurt's termination. On May 9, 2008, the decision of the Commission was approved and entered into the record for publication. No further administrative proceedings were instituted by Kurt following the appeal of her termination to the Commission. On April 19, 2010, Kurt filed her complaint for a writ of mandamus. On May 27, 2010, the

City filed its motion for summary judgment. On July 14, 2010, Kurt filed her brief in opposition to the motion for summary judgment.

## II. Mandamus: Standard of Review

**{¶ 5}** In order for this court to issue a writ of mandamus, Kurt must establish that: (1) she possesses a clear legal right to reinstatement to the position of Fair Housing Administrator; (2) the City possesses a clear legal duty to reinstate Kurt to the position of Fair Housing Administrator; and (3) there exists no other adequate remedy in the ordinary course of the law. *State ex rel. Manson v. Morris* (1993), 66 Ohio St.3d 440, 613 N.E.2d 232; *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 451 N.E.2d 225; *State ex rel. Westchester Estates, Inc. v. Bacon* (1980), 61 Ohio St.2d 42, 399 N.E.2d 81. Moreover, mandamus is an extraordinary remedy that is to be granted with caution and only when the right is clear. "The duty to be enforced by a writ of mandamus must be specific, definite, clear and unequivocal." *State ex rel. Karmasu v. Tate* (1992), 83 Ohio App.3d 199, 205, 614 N.E.2d 827. It should not be issued in doubtful cases. *State ex rel. Taylor v. Glasser* (1977), 50 Ohio St.2d 165, 364 N.E.2d 1; *State ex rel. Shafer v. Ohio Turnpike Comm*. (1953), 159 Ohio St. 581, 113 N.E.2d 14; *State ex rel. Cannole v. Cleveland Bd. of Edn*. (1993), 87 Ohio App.3d 43, 621 N.E.2d 850.

**{¶ 6}** Additionally, if Kurt possessed an adequate remedy in the ordinary course of the law, regardless of whether it was used, relief in mandamus is

precluded. *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45, 1997-Ohio-245, 676 N.E.2d 108; *State ex rel. Boardwalk Shopping Ctr., Inc. v. Court of Appeals for Cuyahoga Cty*. (1990), 56 Ohio St.3d 33, 564 N.E.2d 86; *State ex rel. Grahek v. McCafferty*, Cuyahoga App. No. 88614, 2006-Ohio-4741.

## III. Legal Analysis

**{¶ 7}** Kurt argues that she is entitled to relief in mandamus because of the Ohio Supreme Court's decision in *Lima v. Ohio*, 122 Ohio St.3d 155, 2009-Ohio-2597, 909 N.E.2d 616, and the recent decision rendered by this court in *Missig v. Cleveland Civil Serv. Comm*., Cuyahoga App. No. 91699, 2010-Ohio-2595. The City, however, argues that Kurt is not entitled to mandamus because she possessed an adequate remedy at law through an administrative appeal to the Cuyahoga County Court of Common Pleas, from the judgment of the Commission pursuant to R.C. Chapter 2506. Specifically, the City argues that Kurt's failure to exhaust all available administrative remedies prevents this court form issuing a writ of mandamus. We agree with this argument.

**{¶ 8}** Kurt, in an attempt to overcome the City's claim that she possessed an adequate remedy at law through the administrative appeals process, argues that any appeal would have constituted a vain act. Kurt argues that she did not exhaust all administrative remedies, through an appeal as permitted under R.C. Chapter 2506, because "[p]ursuing an administrative appeal at the time of her

termination *would not have been a complete, beneficial and speedy remedy* for [her] because the decision of *Lima v. State* was not available for her to argue at that time and the commission refused to grant a stay in the matter." (Emphasis added.) See p. 13 of Kurt's brief in opposition to the City's motion for summary judgment.

**{¶ 9}** The Supreme Court of Ohio has firmly established that "prior to seeking court action in an administrative matter, the party must exhaust the available avenues of administrative relief through administrative appeal." *Noernberg v. Brook Park* (1980), 63 Ohio St.2d 26, 29, 406 N.E.2d 1095, 1097, citing *State ex rel. Lieux v. Westlake* (1951), 154 Ohio St.412, 96 N.E.2d 414. The failure of a party to exhaust all available administrative remedies allows a trial court to decline to intervene in the controversy as a matter of judicial economy. See *Nemazee v. Mt. Sinai Medical Center* (1990), 56 Ohio St.3d 109, 111, 564 N.E.2d 477. "The purpose of the [exhaustion] doctrine '* * * is to permit an administrative agency to apply its special expertise '* * * in developing a factual record without premature judicial intervention.'" Id., quoting *Southern Ohio Coal Co. v. Donovan* (C.A.6, 1985), 774 F.2d 693, 702.

**{¶ 10}** Two limited exceptions exist to the exhaustion doctrine: (1) the existence of a judicial remedy that is intended to be separate and apart from the administrative remedy, e.g., a claim for discriminatory practices under R.C. Chapter 4112; and (2) the pursuit of an administrative remedy would constitute a

vain act. This court, in determining whether the claim of a vain act excuses a party from exhausting all administrative remedies, vis-a-vis an action for wrongful discharge for failure to comply with the City's residency requirement and reinstatement to the former position of employment, held that:

**{¶ 11}** "* * * But the mere fact that a party does not believe he or she will prevail at the administrative level does not render an administrative appeal to be a vain act. Indeed, '[a] *vain act is defined in the context of lack of authority to grant administrative relief and not in the sense of lack of probability that the application for administrative relief will be granted*.' *Gates Mills Invest. Co. v. Pepper Pike* (1978), 59 Ohio App.2d 155, 167, 392 N.E.2d 1316. (Emphasis added.)

**{¶ 12}** "Here, we find neither exception applies and therefore cannot say that the trial court erred in declining to intervene based on [relator's] failure to comply with the residency requirement. [Relator] sought reinstatement of his employment. * * *

**{¶ 13}** "And although we recognize that the Ohio Supreme Court in *Lima v. State*, 122 Ohio St.3d 155, 2009-Ohio-2597, 909 N.E.2d 616, has since declared R.C. 9.481 to be constitutional, thereby prohibiting municipalities from enforcing residency requirements upon their employees, we still cannot say that the trial court erroneously applied the exhaustion doctrine. [Relator's] failure to first exhaust his administrative remedies precludes him from subsequently reaping the

benefits of the *Lima* decision. Cf. *Missig v. Cleveland Civ. Serv. Comm*., 123 Ohio St.3d 239, 2009-Ohio-5256, 915 N.E.2d 642 (employee first filed an appeal with the Civil Service Commission prior to filing appeals with the common pleas court, appellate court, and supreme court)." *McNally v. Cleveland*, Cuyahoga App. No. 92697, 2010-Ohio-512, ¶12.

**{¶ 14}** Applying the holding of *McNally* to the present action in mandamus, we find that the failure of Kurt to completely exhaust her available administrative remedies, through an appeal to the Cuyahoga County Court of Common Pleas pursuant to R.C. Chapter 2506, prevents this court from issuing a writ of mandamus on her behalf. Clearly, Kurt possessed an adequate remedy at law that was not employed in a timely manner. *State ex rel. Hughley v. McMonagle*, 121 Ohio St.3d 536, 2009-Ohio-1703, 905 N.E.2d 1220; *State ex rel. Jaffal v. Calabrese*, 105 Ohio St.3d 440, 2005-Ohio-2591, 828 N.E.2d 107.

**{¶ 15}** Finally, it must be noted that Kurt has not established that she possesses a clear legal right to be reinstated to the former position of Fair Housing Administrator or that the City possesses a clear legal duty to reinstate her to the former position of employment based upon the decision rendered in *Lima*. The judgment rendered by the Ohio Supreme Court in *Lima* is silent as to the issue of reinstatement. As stated previously, mandamus shall issue only when the right is clearly established. Mandamus cannot be granted in doubtful cases. Kurt's failure to clearly establish that she is entitled to reinstatement to

her former position of employment with the City prevents us from issuing a writ of mandamus. *State ex rel. Alben v. State Emp. Relations Bd.*, 76 Ohio St.3d 133, 1996-Ohio-120, 666 N.E.2d 1119; *State ex rel. Fant v. Mengel* (1991), 62 Ohio St.3d 197, 580 N.E.2d 1088*; State ex rel. Fant v. Sykes* (1986), 28 Ohio St.3d 90, 502 N.E.2d 597.

Accordingly, we grant the City's motion for summary judgment. Costs to Kurt. It is further ordered that the Clerk of the Eighth District Court of Appeals serve notice of this judgment upon all parties as required by Civ.R. 58(B).

Writ denied.

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MELODY J. STEWART, PRESIDING JUDGE

JAMES J. SWEENEY, J., and
COLLEEN CONWAY COONEY, J., CONCUR