[Cite as *Hargrette v. RMI Titanium Co.*, 2010-Ohio-406.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

DENNIS A. HARGRETTE, JR., et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2009-T-0058**
- vs -	:	
RMI TITANIUM COMPANY,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2007 CV 1497.

Judgment: Affirmed.

Raymond J. Masek, 183 West Market Street, Suite 300, Warren, OH 44481-1022 (For Plaintiffs-Appellants).

Anthony J. DiVenere, McDonald Hopkins Co., L.L.C., 2100 Bank One Center, 600 Superior Avenue, East, Cleveland, OH 44114-2653 (For Defendant-Appellee).

TIMOTHY P. CANNON, J.

{¶1} This case is submitted to this court on the record and the briefs of the parties. Appellants, Dennis A. Hargrette, Jr. and Michael McKinnon, appeal the judgment of the Trumbull County Court of Common Pleas. The trial court granted a motion for summary judgment filed by appellee, RMI Titanium Company.

{¶2} Both appellants are African-American males. Hargrette was an employee of appellee from 1981 until his retirement in 2007. McKinnon is currently an employee of appellee, having begun his employment there in 1996. Both Hargrette and McKinnon

are members of the elected union, and a collective bargaining agreement ("CBA") exists between the union and appellee.

{¶3} In June 2007, appellants filed a complaint against appellee in the Trumbull County Court of Common Pleas alleging claims of racial discrimination.

{¶4} Appellee filed a notice of removal to federal court. The trial court removed the matter to federal court. Subsequently, the United States District Court, Northern District of Ohio, remanded the matter to the Trumbull County Court of Common Pleas.

{¶5} Appellee filed a motion for summary judgment. Appellee attached an affidavit from Robert Nypaver to its motion. Nypaver is the Manager of Labor Relations for appellee. He identified several documents, which were also attached to appellee's motion.

{¶6} Appellants filed a brief in opposition to appellee's motion for summary judgment. Appellants attached affidavits from McKinnon and Hargrette to their brief in opposition. Thereafter, appellee filed a reply to appellants' brief in opposition. In addition to the attachments and the parties' briefs and motion, Hargrette's and McKinnon's depositions were filed for the trial court's consideration.

{¶7} The trial court granted appellee's motion for summary judgment. The trial court held that appellee was entitled to judgment as a matter of law on appellants' claims for several reasons. The court held that appellants' federal claims were barred because of federal preemption, since the claims involved interpretation of the CBA. Also, the trial court noted that appellants failed to exhaust their administrative remedies. In regard to their state claims, the trial court found some of them were barred by the six-year statute of limitations applicable to claims under R.C. 4112.99. Finally, in regard to all of appellants' claims, the trial court concluded that appellants "produced no

admissible and credible evidence beyond their own personal beliefs *** to support a claim for racial discrimination." Also, the trial court found that appellee asserted legitimate, nondiscriminatory reasons for its decisions, and that appellants did not rebut these assertions with evidence that they were pretexts for illegal discrimination.

{¶8} Appellants raise the following assignment of error:

{¶9} "The trial court erred to the prejudice of plaintiffs-appellants in its holding with regard to exhaustion of administrative remedies and the barring of so-called federal claims to the extent they were so plead in the complaint."

{¶10} In order for a motion for summary judgment to be granted, the moving party must demonstrate:

{¶11} "(1) [N]o genuine issue as to any 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 viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385. (Citation omitted.)

{¶12} Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of facts, if any, *** show that there is no genuine issue as to any material fact ***." Civ.R. 56(C). Material facts are those that might affect the outcome of the suit under the governing law of the case. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, quoting *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶13} If the moving party meets this burden, the nonmoving party must then provide evidence illustrating a genuine issue of material fact, pursuant to Civ.R. 56(E). *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Civ.R. 56(E) provides:

{¶14} "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶15} Summary judgment is appropriate pursuant to Civ.R. 56(E) if the nonmoving party does not meet this burden.

{¶16} Appellate courts review a trial court's entry of summary judgment de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. "*De novo* review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal* (1980), 64 Ohio St.2d 116, 119-120.

{¶17} In their appellate brief, appellants criticize the trial court's approach in granting appellee's motion for summary judgment. Specifically, appellants contend that the trial court should have individually addressed the various claims set forth in their complaint instead of ruling on their claims in a general fashion. Despite this criticism, appellants' appellate brief is even more generic and generalized in arguing the trial court's alleged errors. Appellants do not individually address their claims to support

their arguments that the trial court erred in granting appellee's motion for summary judgment.

{¶18} Appellants' assigned error finds fault with the trial court's conclusion that their claims were barred by federal preemption and failure to exhaust administrative remedies. However, it is important to note that the trial court cited several reasons as to why there are no genuine issues of material fact and that appellee is entitled to judgment as a matter of law. On appeal, appellants do not challenge the trial court's conclusions that they did not support their claims of racial discrimination or that appellee had legitimate, nondiscriminatory reasons for its decisions. However, pursuant to our de novo review, we will briefly address all of appellants' claims to provide a complete analysis of the issues involved in this matter.

{¶19} Appellants alleged violations of both federal and state law in their complaint. Initially, we will address the trial court's judgment entry with respect to the federal claims.

{¶20} In regard to the federal claims, appellants' position is confusing. Appellants' assigned error asserts that the trial court erred by finding that their federal claims were barred by federal preemption and failure to exhaust administrative remedies. Then, later in their brief, appellants argue that "issues of federal pre-emption and exhaustion of remedies *** have no place in a state court action brought under the Ohio Civil Rights Act." Appellants made a similar argument at the trial court level in their brief in opposition to appellee's motion for summary judgment: "[p]laintiffs are in state court with a perfect right to sue under the provisions of the Ohio Civil Rights Act with no administrative prerequisites required." Thus, it appears as if appellants have abandoned their federal claims.

{¶21} The trial court's judgment entry held that some of appellants' claims were barred by Section 301 of the Labor Management Relations Act ("LMRA"), codified as Section 185, Title 29, U.S.Code. In interpreting this section, courts have held, "'if the resolution of a state-law claim depends on the meaning of a collective-bargaining agreement, the application of state law *** is pre-empted' and the claim must be submitted to the grievance and arbitration procedure provided for in the collective bargaining agreement." *Dalton v. Jefferson Smurfit Corp.* (S.D.Ohio 1997), 979 F.Supp. 1187, 1198, quoting *Lingle v. Norge Div. of Magic Chef, Inc.* (1988), 486 U.S. 399, 405-406. The following test has been adopted to determine whether preemption under the LMRA is proper:

{¶22} "'First, the district court must examine whether proof of the state law *claim* requires interpretation of collective bargaining agreement terms. Second, the court must ascertain whether *the right claimed by the plaintiff* is created by the collective bargaining agreement or by state law. If the *right* is both borne of state law and does not invoke contract interpretation, then there is no preemption.'" Id. at 1199, quoting *DeCoe v. Gen. Motors Corp.* (C.A.6, 1994), 32 F.3d 212, 216. (Emphasis added by *Dalton* Court.)

{¶23} Appellants claims that 1) persons outside the protected class were treated more favorably in the hiring practices of the maintenance department, 2) Hargrette did not receive proper priority in a call-back after a work stoppage, 3) they received disparate treatment regarding incentive pay and training opportunities, and 4) appellee discriminated against them in the terms and conditions of their employment all require interpretation of the CBA. In addition, the claims regarding incentive pay, training

opportunities, and call-back rights are all based upon rights controlled by the CBA. Accordingly, these claims are preempted by the LMRA.

{¶24} With respect to the remaining federal claims, we will address them in a consolidated analysis with appellants' state law claims. This is because "the standard for state law discrimination claims asserted under Section 4112 of the Ohio Revised Code is the same as the standard for federal discrimination claims asserted under Title VII and related civil rights statutes." *Pittman v. Cuyahoga Valley Career Ctr.* (N.D.Ohio, 2006), 451 F.Supp.2d 905, 930. (Citations omitted.)

{¶25} In regard to the state claims, appellants filed this action alleging racial discrimination and seeking relief pursuant to R.C. 4112.99. R.C. 4112.99 allows for civil remedies for violations of R.C. Chapter 4112, including R.C. 4112.02, which provides, in part:

{¶26} "It shall be an unlawful discriminatory practice:

{¶27} "(A) For any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment."

{¶28} The statute of limitations for claims brought under R.C. 4112.99 is six years. *Jackson v. Internatl. Fiber*, 169 Ohio App.3d 395, 2006-Ohio-5799, at ¶20, citing *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.* (1994), 70 Ohio St.3d 281, syllabus.

{¶29} One of appellants' claims relates to a stuffed monkey that was placed in the melt shop. Pursuant to McKinnon's affidavit, this action occurred in 1998. Since the

instant complaint was not filed until 2007, this claim is barred by the statute of limitations.

{¶30} While not specifically mentioned in their complaint, appellants' causes of action under R.C. Chapter 4112 were apparently based on the independent theories of disparate treatment and hostile work environment. See *Brown v. Dover Corp.*, 1st Dist. No. C060-123, 2007-Ohio-2128, at ¶14. (Citations omitted.)

{¶31} In regard to their disparate treatment claims, appellants assert that persons outside the protected class were treated more favorably in the hiring practices of the maintenance department; that Hargrette did not receive proper priority in a call-back after a work stoppage; that they received disparate treatment regarding incentive pay and training opportunities, and that appellee discriminated against them in the terms and conditions of their employment.[1] As previously noted, some of these claims are preempted by the LMRA.

{¶32} The following elements must be met for a race discrimination case under an adverse employment action theory: (1) the individual is a racial minority; (2) the individual suffered an adverse employment action; (3) the individual was qualified to receive the benefit; and (4) another individual, who is not a member of the protected class, received more favorable treatment. *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 385, citing *McDonnell Douglass Corp. v. Green* (1973), 411 U.S. 792.

{¶33} "If the plaintiff establishes a prima facie case, the burden shifts to the defendant to show a legitimate, nondiscriminatory reason for the [action]. *** If the

1. These claims are taken from appellants' complaint. Individually, Hargrette and McKinnon discuss several incidents in their depositions. However, appellants' counsel, neither at the trial court level nor on appeal, conducts the requisite analysis of the individual incidents to support which of the claims are arguably meritorious. We will conduct a brief analysis of some of the incidents referenced in appellants' depositions.

defendant makes this showing, the burden shifts once more to the plaintiff to demonstrate that the defendant's articulated reasons for the [action] were merely a pretext for impermissible racial discrimination." *Smith v. Five Rivers Metroparks* (1999), 134 Ohio App.3d 754, 761. (Citations omitted.)

{¶34} In regard to all their claims, appellants have produced evidence that they are members of a protected class. Both appellants state in their depositions that they are African-American and employed by appellee.

{¶35} The majority of Hargrette's affidavit references the number of employees of various subdivisions of the maintenance department. He asserts that there are "no blacks in these groups." However, in reference to his subdivision, "riggers," he states that "I am the only black." Since Hargrette is a member of the maintenance department, appellants have not demonstrated an adverse employment action as it relates to Hargrette.

{¶36} Likewise, appellants did not demonstrate an adverse employment action in regard to McKinnon as it relates to the maintenance department. In his deposition, McKinnon stated he did not apply for a position as a maintenance apprentice because he did not feel he had a chance. Since he did not apply, appellants have not demonstrated an adverse employment action. Moreover, we note that when he was asked if the real reason he did not apply for the position was that it paid less, McKinnon replied that it paid less and required more schooling.

{¶37} In his deposition, Hargrette complained that his name was removed from an overtime list. However, he noted that this did not occur until February 2007, when appellee learned of his intention to retire. Hargrette retired in April 2007. We note that "de minimus employment actions are not materially adverse and, thus, not actionable."

Brown v. Dover Corp., 2007-Ohio-2128, at ¶29. (Citations omitted.) Hargrette contends he was removed from the list and precluded from overtime opportunities for the final few weeks of his employment. Due to this short time period and lack of evidence that there were specific overtime opportunities during this time, it is arguable that this claim does not qualify as an adverse employment action. Moreover, Hargrette acknowledged that the reason his name was removed from the list was his pending retirement. Thus, even if this was a qualifying adverse employment action, there was evidence in the record that appellee had a legitimate, nondiscriminatory reason for it.

{¶38} Appellants claim appellee discriminated against them because nonminorities with less total seniority were recalled ahead of them following a work stoppage. However, in his affidavit, Nypaver states that recalls under the CBA were conducted by unit, instead of straight seniority. Thus, appellee has supplied evidence that there was a legitimate, nondiscriminatory reason for the recall procedure.

{¶39} Appellants contend that McKinnon was denied incentive pay. However, in his deposition, McKinnon stated that he and a Caucasian employee were both denied incentive pay and that they filed a grievance together. Further, he acknowledged that the grievance he filed regarding incentive pay had nothing to do with his race. Thus, appellants have not shown there was an adverse employment action in regard to this instance. In regard to McKinnon's remaining claims that he did not receive incentive pay, he specifically stated that incentive pay was provided by the CBA. Therefore, for the reasons stated above, these claims are preempted by the LMRA. Similarly, in regard to not receiving training opportunities, McKinnon stated that the CBA covered this topic and that he contacted his union representative about filing a grievance. Thus, this claim is preempted by the LMRA.

{¶40} In regard to appellants' claims regarding alleged adverse employment actions, there are no genuine issues of material fact and appellee is entitled to judgment as a matter of law.

{¶41} Next, we review appellants' hostile work environment claims.

{¶42} "[A] plaintiff alleging a hostile work environment must establish that (1) the employee was a member of a protected class, (2) the employee was subject to unwelcome harassment, (3) the harassment complained of was based on race, (4) the harassment had the purpose or effect of unreasonably interfering with the employee's work performance or creating an intimidating, hostile, or offensive work environment, and (5) respondeat superior liability existed." *Brown v. Dover Corp.*, 2007-Ohio-2128, at ¶37, citing *Delaney v. Skyline Lodge, Inc.* (1994), 95 Ohio App.3d 264, 270. (Secondary citation omitted.)

{¶43} With regard to the noose incident, McKinnon stated in his affidavit that a noose, made out of rope, was hung over the workstation of an African-American foreman in 2001. While it was obviously inappropriate, for the following reasons, appellants have not demonstrated that the noose created a hostile work environment. McKinnon never mentioned the noose incident during his deposition, and there is nothing in the record to establish that anyone in a supervisory capacity of any sort was aware of, permitted, condoned, or otherwise tacitly allowed it to remain in place for any period of time. We note the noose was not specifically directed at either of appellants. See *Brown v. Dover Corp.*, 2007-Ohio-2128, at ¶42. Also, according to McKinnon, the noose was "taken down and given to Human Resources."

{¶44} In his deposition, Hargrette stated that a kangaroo sign was hung up. The limited evidence submitted by appellants in regard to this incident suggests it was

isolated. Further, there is no evidence provided that this act was performed by a supervisor or even that it implicates racially motivated conduct.

{¶45} Next, we address the comment allegedly made by Jim Kearns to McKinnon. In 2002, Kearns allegedly called McKinnon a "nigger."

{¶46} "Whether a stray remark is actionable race or sex discrimination depends on the following factors: (1) was the comment made by a decision-maker or an agent in the scope of employment; (2) was the comment related to the decision-making process; (3) was the comment an isolated remark; and (4) was the comment in proximity to the alleged discriminatory remark?" *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d at 384, citing *Cooley v. Carmike Cinemas, Inc.* (C.A.6, 1994), 25 F.3d 1325.

{¶47} Pursuant to the evidence submitted, the inappropriate comment occurred during an argument between Kearns and McKinnon. The argument resulted in both Kearns and McKinnon being suspended for three days. In his deposition, McKinnon states that Kearns was not a supervisor. In addition, this remark appears to be an isolated instant. While McKinnon stated he did not get along with Kearns, it is only alleged that Kearns called McKinnon a "nigger" on this single occasion. Finally, we note that, upon being informed of the incident, management investigated the situation and reprimanded Kearns for his misconduct.

{¶48} In regard to appellants' claims regarding an adverse employment action, there are no genuine issues of material fact and appellee is entitled to judgment as a matter of law.

{¶49} Since there were no genuine issues of material fact on any of appellants' claims and appellee was entitled to judgment as a matter of law, the trial court did not err by granting appellee's motion for summary judgment.

{¶50} Appellants' assignment of error is without merit.

{¶51} The judgment of the Trumbull County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDELL, J.,

concur.