

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
ERIE COUNTY

Jeanne Gallagher

Court of Appeals No. E-09-008

Appellee

Trial Court No. 2007 CV 0779

v.

AMVETS Post 17

**DECISION AND JUDGMENT**

Appellant

Decided: December 4, 2009

\* \* \* \* \*

Thomas J. McGuire, for appellee.

Timothy H. Dempsey, for appellant.

\* \* \* \* \*

HANDWORK, P.J.

{¶ 1} This accelerated case is before the court on appeal from a judgment of the Erie County Court of Common Pleas.

{¶ 2} Briefly, appellee, Jeanne Gallagher, was a member and an officer of appellant, AMVETS Post 17 ("Post 17"). Appellee was first suspended from Post 17 for

a period of six months for writing an unfavorable letter to the district and state AMVETS offices. Subsequently, appellee was suspended for life for allegedly violating appellant's policies. On September 5, 2007, appellee filed a complaint in which she set forth a discrimination claim, asserting that she was actually suspended for life because she is a female. Post 17 answered and subsequently filed a motion for summary judgment; appellee filed a memorandum in opposition.

{¶ 3} On October 8, 2008, the common pleas court granted appellant's motion for summary judgment. The court found that appellee failed to offer any evidentiary materials demonstrating gender discrimination in support of her memorandum in opposition. The judge further noted that her suspension was admittedly based upon the fact that she made an obscene gesture to two other Post 17 officers as they were leaving the boardroom, but failed to provide any evidence that any male member of Post 17 in a similar situation was treated differently.

{¶ 4} Following the trial court's judgment, appellant filed a motion for sanctions pursuant to R.C. 2323.51. Post 17 also requested attorney fees under Civ.R. 11, as well as court costs and prejudgment interest and a hearing on its motion. On January 28, 2009, the trial judge determined that there was no basis for sanctions under R.C. 2323.51 and also denied appellant's motion for a hearing on its request for sanctions.

{¶ 5} Appellant timely appeals this decision and claims that the following error occurred in the proceedings below:

{¶ 6} "I. The trial court erred by denying the motion for sanctions and by doing this without a hearing.

{¶ 7} "A. ORC 2323.51 [sic]

{¶ 8} "B. Civil Rule 11

{¶ 9} "C. Sanction hearing"

{¶ 10} Our "standard of review of R.C. 2323.51 determinations involves mixed questions of law and fact. Therefore, the legal questions are subject to de novo review and the trial court's factual determinations will not be disturbed if there is competent, credible evidence to support them." *Grine v. Sylvania Schools Bd. of Edn.*, 6th Dist. No. L-06-1314, 2008-Ohio-1562, ¶ 41 (citation omitted).

{¶ 11} Nonetheless, appellate review of a trial court's ultimate decision to impose sanctions pursuant to R.C. 2323.51 is an abuse of discretion standard. *Burrell v. Kassiech* (1998), 128 Ohio App.3d 226, 230. An abuse of discretion involves more than a mere error of law or judgment, it means that a trial judge's attitude in reaching his or her decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

Post 17 asserts that appellant's conduct was frivolous within the meaning of R.C. 2323.51 for a number of reasons. This statutory section reads, in pertinent part:

{¶ 12} "(A) As used in this section:

{¶ 13} "(1) \* \* \*

{¶ 14} "(2) "Frivolous conduct" means any of the following:

{¶ 15} "(a) Conduct of an inmate or other party to a civil action \* \* \* or of the inmate's or other party's counsel of record that satisfies any of the following:

{¶ 16} "(i) It obviously serves merely to harass or maliciously injure another party to the civil action \* \* \* including, but not limited to, \* \* \* a needless increase in the cost of litigation.

{¶ 17} "(ii) It is not warranted under existing law \* \* \*.

{¶ 18} "(iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation and discovery."

{¶ 19} Appellant first notes, as it did below, that appellee initially elected to pursue a remedy for gender discrimination pursuant to R.C. Chapter 4112, that no probable cause was found as a result of that proceeding, and that she failed timely to seek judicial review of that decision in the common pleas court pursuant to R.C. 4112.06. Consequently, Post 17 argues that appellee was precluded from filing the instant action because she failed to exhaust her administrative remedies thereby rendering her conduct frivolous within the meaning of R.C. 2323.51(A)(2)(a)(ii). We disagree.

{¶ 20} An individual who opts to pursue a gender discrimination claim under R.C. Chapter 4112 is not required to exhaust all of his or her administrative remedies prior to instituting a gender discrimination action at law. See *Noday v. Mahoning Cty. Sheriff*, 147 Ohio App.3d 38, 2002-Ohio-609, ¶ 19-20, citing *Smith v. Friendship Village of*

*Dublin, Ohio, Inc.* (2001), 92 Ohio St.3d 503, 506-507. See, also, R.C. 4112.99.

Therefore, under the circumstances of this cause, an individual could bring appellee's discrimination claim, and it would not be deemed frivolous within the parameters of R.C. 2323.51(A)(2)(a)(ii).

{¶ 21} Appellant further maintains that appellee pursued this case knowing that her claim was baseless; therefore, her conduct in instituting a civil suit was solely for the purpose of harassing Post 17 within the meaning of R.C. 2323.51(A)(2)(a)(i). Finally, appellant maintains that appellee's conduct was frivolous under R.C. 2351.51(A)(2)(a)(iii) because she failed to produce any evidentiary support for her discrimination claim.

{¶ 22} As mentioned above, appellee filed her complaint on September 5, 2007. Appellant filed its answer on October 5, 2007. Post 17 filed its notice of discovery on October 23, 2007, and a motion to compel discovery on January 8, 2008. In the motion to compel, appellant indicated that appellee responded to discovery as of December 21, 2007, but that answers to requests for admissions were incomplete and were not verified and signed by appellee. Appellant also asserted that appellee had not provided documents requested pursuant to Civ.R. 34.

{¶ 23} On January 22, 2008<sup>1</sup>, the trial court granted appellant's motion to compel holding:

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<sup>1</sup>In a response submitted on January 25, appellee pointed out that until after appellee threatened to file her own motion to compel, appellant failed to comply with Civ.R. 33 by submitting interrogatories in both an electronic and written form.

{¶ 24} "The answers to defendant's questions 14, 16, & 18 shall be fully answered and supplemented by plaintiff. If they are not supplemented, the answers already provided shall be deemed completely answered. Furthermore, plaintiff shall verify under oath the answers to all discovery questions. The plaintiff is ordered to respond accordingly to the discovery filed in this case by February 12, 2008."

{¶ 25} On February 11, 2008, appellee filed a notice informing the trial court that she had supplemented her discovery. On February 19, 2008, appellant notified the trial court of the fact that it sent a combined second set of interrogatories and requests for admissions to appellee. There is no evidence in the record of this cause demonstrating that appellee ever responded to appellant's second discovery requests. Moreover, none of the discovery, e.g., answers to interrogatories and/or admissions, are in the record of this cause.

{¶ 26} In the affidavit filed in support of appellee's memorandum in opposition to appellant's request for sanctions, her attorney, Thomas McGuire, averred that appellee told him she had witnesses who were willing to testify on her behalf. McGuire swore, however, that over the course of this cause appellee was finding it difficult to provide him with the names and addresses of these witnesses. He, therefore, responded to any and all of appellant's discovery requests as best he could with the information that was provided. According to McGuire, he also provided all of the necessary responses to appellant's

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According to appellee, she only had one day left to respond to discovery and did so within that time frame.

discovery requests. He further stated that he conducted extensive legal research before filing this action and found no law that would bar appellee from filing the same. In addition, he maintained that he did not engage in discovery because he had the record from the Ohio Civil Rights Commission proceedings.

{¶ 27} Based upon the forgoing, we cannot say that appellee's discrimination action was brought solely for the purpose of harassing Post 17. Furthermore, based upon the record filed in this court, we are unable to find that this cause is frivolous within the meaning of R.C. 2351.51(A)(2)(a)(iii). Therefore, the trial court's attitude in denying appellant's motion for sanctions, attorney fees, and a hearing pursuant to R.C. 2323.51 is not unreasonable, arbitrary, or unconscionable.

{¶ 28} Appellant further argues that the trial court should have granted its motion for sanctions under Civ.R. 11. Post 17 asserts, as it did below, that: (1) appellee's trial counsel filed a frivolous complaint because he failed to produce any evidentiary material in support of his client's claim of gender discrimination; (2) trial counsel failed to exhaust his client's administrative remedies; and (3) trial counsel failed to file anything to counter its motion for sanctions. Appellant also contends that the trial court erred in failing to hold a hearing on its Civ.R. 11 motion for sanctions.

{¶ 29} We note at the outset of this discussion of the trial court's alleged error in overruling appellant's Civ.R. 11 motion for sanctions, that the court below never made any express ruling on said motion. Nevertheless, when a trial court fails to rule upon a

pending motion, it may be presumed that the court overruled it. See *Lorence v. Goeller*, 9th Dist. No. 04CA008556, 2005-Ohio-2678, ¶ 47.

{¶ 30} Civ.R. 11 governs the signing of motions, pleadings, and other documents and states, in pertinent part:

{¶ 31} "The signature of an attorney \* \* \* constitutes a certificate by the attorney \* \* \* that the attorney \* \* \* has read the document; that to the best of the attorney's \* \* \* knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. For a willful violation of this rule, an attorney \* \* \* upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. Similar action may be taken if scandalous or indecent matter is inserted."

{¶ 32} When ascertaining if sanctions should be imposed pursuant to Civ.R. 11, a court determines whether "the attorney filing the pleading or motion (1) read the document; (2) possesses good grounds for filing it, and; (3) did not file the document with a purpose to delay the proceedings." *Callahan v. Akron Gen. Med. Ctr.*, 9th Dist. Nos. 24434, 24436, 2009-Ohio-5148, ¶ 24, citing *Ceol v. Zion Industries, Inc.* (1992), 81 Ohio App.3d 286, 290. If one of these requirements is not satisfied, the court must then decide whether the violation was willful rather than simply negligent. *Id.* When a trial

court determines that a violation of Civ. R. 11 was willful, it may impose an appropriate sanction. *Ceol v. Zion Industries, Inc.* (1992), 81 Ohio App.3d 286, 290. As with R.C. 2323.51, the imposition of sanctions pursuant to Civ.R. 11 is a matter within the sound discretion of the trial court. *State ex rel. Fant v. Sykes* (1987), 29 Ohio St.3d 65.

{¶ 33} The term "willful" is defined as "voluntarily, knowingly, deliberate \* \* \* intentional, purposeful, not accidental or involuntary." Black's Law Dictionary (6 Ed.1991) 1103. Assuming, arguendo, that appellee's trial counsel failed to satisfy one of the requirements of Civ.R. 11, there is no evidence in the record of this case demonstrating that this act was deliberate, intentional, or purposeful. Therefore, the trial court did not abuse its discretion in overruling appellant's Civ.R. 11 motion for sanctions without a hearing.

{¶ 34} Appellant's sole assignment of error is found not well-taken. The judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, J.  
CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.