

[Cite as *Pinkney v. Cleveland*, 2009-Ohio-5840.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93161

MICHAEL PINKNEY

PLAINTIFF-APPELLANT

vs.

CITY OF CLEVELAND

DEFENDANT-APPELLEE

**JUDGMENT
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-655505

BEFORE: Dyke, J., Rocco, P.J., and Boyle, J.

RELEASED: November 5, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Murray R. Jacobson, Esq.
55 Public Square, Suite 1750
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE

James C. Cochran, Esq.
Assistant Director of Law
City of Cleveland Department of Law
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, J.:

{¶ 1} Plaintiff Michael Pinkney appeals from the order of the trial court that awarded summary judgment to defendant the City of Cleveland, Division of Water Pollution Control (“city”). For the reasons set forth below, we affirm.

{¶ 2} Plaintiff was incarcerated in the county jail on June 14, 2007. On June 25, 2007, his employer, the city, sent notice to him at his residence that under the terms of the parties’ collective bargaining agreement, following five consecutive absences, he was required to be examined by a designated agency or physician before returning to work. The city additionally advised him that in the event that he would be away from work for ten or more days, plaintiff had to provide a satisfactory explanation for his absence and that the failure to do so would be deemed a resignation from employment. On June 28, 2007, the city sent plaintiff an additional letter to plaintiff’s residence that stated that on June 18, 2007, Piper Pinkney advised the city that plaintiff hurt his hip and his return to work date was uncertain, but the city had learned that plaintiff was actually incarcerated at this time. The city further advised plaintiff that the unexcused failure to return to work would be construed as a resignation in the absence of a satisfactory explanation.

{¶ 3} On August 28, 2007, the action against plaintiff was dismissed without prejudice after the alleged victim failed, for the second time, to appear in court. See *State v. Pinkney*, Common Pleas Case No. CR-496783-A.

{¶ 4} Plaintiff was terminated and his union filed a grievance of his behalf. The union completed three of four steps of the grievance procedure, but did not succeed in getting plaintiff reinstated. The union then dismissed the grievance.

{¶ 5} On April 1, 2008, plaintiff filed this action for wrongful termination, alleging that he informed a fellow-employee that he was incarcerated and could not report for work, that the city sent the various notices to his residence during the period of his incarceration, and that he did not receive the notices due to his incarceration.

{¶ 6} The city moved for summary judgment, and presented evidence that it had been informed that plaintiff was absent from work due to a hip injury. As required under Civil Service Rule 8.45, the city sent notice to plaintiff at his last known address that his continuing unexcused absence would be construed as a resignation in the absence of a satisfactory explanation. The city subsequently learned that plaintiff was incarcerated.

{¶ 7} The city additionally presented evidence that employees are not granted leave from employment if they are incarcerated. On July 13, 2007, the city notified plaintiff that his continued absence without satisfactory explanation was deemed a resignation. Plaintiff's union filed a grievance in this matter, but pursued only three of the four steps set forth in the collective bargaining agreement. At the close of Step 3 of the proceedings, the grievance was determined to be without merit. The grievance was then dismissed before completion of Step 4.

{¶ 8} In opposition, plaintiff argued that he did not receive any of the notices at issue herein due to his incarceration. He further complained that his due process rights were violated.

{¶ 9} The trial court initially denied the city's motion for summary judgment, then upon sua sponte reconsideration, granted the motion. Plaintiff now appeals and assigns three errors for our review.

{¶ 10} In his first assignment of error, plaintiff asserts that he is not required to exhaust the grievance procedure set forth in the collective bargaining agreement before bringing suit. This claim lacks merit.

{¶ 11} With regard to procedure, we note that we review the grant of summary judgment de novo using the same standards as the trial court. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 652 N.E.2d 684.

{¶ 12} A trial court may not grant a motion for summary judgment unless the evidence before the court demonstrates that: (1) no 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. See, e.g., *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429-30, 674 N.E.2d 1164, 1171.

{¶ 13} The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment. *Id.*, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46, 47. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Vahila v. Hall*, *supra*.

{¶ 14} In responding to a motion for summary judgment, the nonmoving party may not rest on “unsupported allegations in the pleadings.” Civ.R. 56(E); *Harless v. Willis Day Warehousing Co.*, *supra*. Rather, Civ.R. 56 requires the nonmoving party to respond with competent evidence that demonstrates the existence of a genuine issue of material fact for trial. *Vahila v. Hall*, *supra*. Summary judgment, if appropriate, shall be entered against the non-moving party. *Jackson v. Alert Fire & Safety Equip., Inc.* (1991), 58 Ohio St.3d 48, 52, 567 N.E.2d 1027, 1031.

{¶ 15} If a labor contract sets forth a grievance procedure to be used in resolving disputes between an employer and an employee, common pleas courts have no subject matter jurisdiction unless the procedures are exhausted. *Hall v. Cleveland Dept. Of Public Utilities*, Cuyahoga App. No. 82034, 2003-Ohio-1964.

{¶ 16} As explained in *Hall*:

{¶ 17} “Furthermore, where a collective bargaining agreement provides for final and binding arbitration of grievances, the Public Employees Collective

Bargaining Act, R.C. 4117.01, et seq., precludes an employee from seeking redress beyond the grievance process. *Good v. Cleveland* (June 12, 1997), Cuyahoga App. No. 71102, citing *Sherman v. Burkholder* (Dec. 15, 1994), Cuyahoga App. No. 66600; *McNea v. Cleveland* (1992), 78 Ohio App.3d 123, 127, 603 N.E.2d 1158. The employer, the union, and the members of the union, are subject solely to that grievance procedure. *Cook v. Maxwell* (1989), 57 Ohio App.3d 131, 134, 567 N.E.2d 292; Ohio Revised Code section 4117.10(A).”

{¶ 18} In this matter, plaintiff was a municipal service worker and a member of AFSME Local 100, which has a collective bargaining agreement with the City of Cleveland. The collective bargaining agreement provides for final and binding arbitration of grievances through a four-step procedure. Although plaintiff’s union initiated a grievance, they pursued it only through Step 3, and dismissed it before completion of Step 4. Within his complaint, plaintiff alleged that he was wrongfully terminated because he instructed a co-worker to inform the city that he was incarcerated, and the city nonetheless sent the notices to his home. Because the claim, as set forth in plaintiff’s complaint, concerned his contractual rights, the claim is subject to the dispute resolution procedures of the collective bargaining agreement. R.C. 4117.10. Therefore, because plaintiff therefore failed to exhaust his administrative remedies, the trial court properly awarded summary judgment to the city.

{¶ 19} As to plaintiff’s reliance upon the trial court’s earlier denial of the motion for summary judgment, we note that an order denying a motion for

summary judgment is not a final appealable order, and can be sua sponte reconsidered by the trial court. *Hamilton Ins. Services, Inc. v. Nationwide Ins. Companies*, Richland App. No. 01-CA-6, 2003-Ohio-4482, citing *Chubb Group of Ins. Cos. v. Guyuron* (December 14, 1995), Cuyahoga App. No. 68468. As the court's order denying appellee's motion for summary judgment was not a final appealable order, the court had authority to sua sponte reconsider it at any time. Id.

{¶ 20} In accordance with the foregoing, the first assignment of error is without merit.

{¶ 21} Within his second assignment of error, plaintiff asserts that the city did not properly notify him that he faced termination in this matter because the city had actual notice that he was in jail, but sent the notice of termination to his residence. Because the administrative procedures were not exhausted, we cannot reach this claim. In any event, the documentary evidence demonstrates that Piper Pinkney advised the city on June 18, 2007 that plaintiff could not report to work due to a hip injury. The city therefore properly sent the required notices to plaintiff's residence as required under the Civil Service Rules. Although plaintiff submitted a letter purportedly written by the co-worker on January 30, 2008 to indicate that the co-worker informed the city that plaintiff was incarcerated as of June 14, 2007, this letter was unauthenticated, and obviously not prepared until over six months after the termination.

{¶ 22} In his remaining assignments of error, plaintiff asserts that the city violated his right to due process and deprived him of a property interest protected by the United States and Ohio Constitutions. This claim was not set forth in the complaint. In any event, courts have traditionally applied the following factors in order to determine whether a government employer has violated due process by failing to provide notice and a hearing before terminating an employee:

{¶ 23} “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.” *Gilbert v. Homar* (1997), 520 U.S. 924, 932-933, 117 S.Ct. 1807, 138 L.Ed.2d 120, quoting *Mathews v. Eldridge* (1976), 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18.

{¶ 24} The amount of post-deprivation procedures available impacts the amount of predeprivation procedure required. *McDonald v. Dayton*, 146 Ohio App.3d 598, 2001-Ohio-1825, 767 N.E.2d 764. In some cases, post-deprivation review may be sufficient and no predeprivation process is required. *Id.*

{¶ 25} Because the adequacy of the post-deprivation procedures was not challenged below, we will not address this claim herein.

{¶ 26} The third assignment of error is without merit.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, JUDGE

KENNETH A. ROCCO, P.J., and
MARY J. BOYLE, J., CONCUR