[Cite as *Bryan v. Valley Care Health Sys. of Ohio,* 2016-Ohio-7156.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

JOYCE BRYAN,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
		CASE NO. 2015-T-0130
- vs -	:	
VALLEY CARE HEALTH SYSTEMS OF OHIO (NORTHSIDE),	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas.
Case No. 2014 CV 00196.

Judgment: Affirmed.

James S. Gentile and *Rhys Brendan Cartwright-Jones*, 42 North Phelps Street, Youngstown, OH 44503-1130 (For Plaintiff-Appellant).

Rocco D. Potenza and *Michael Ockerman*, Hanna, Campbell & Powell, LLP, 3737 Embassy Parkway, Suite 100, Akron, OH 44333 (For Defendant-Appellee).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Joyce Bryan, appeals from the November 24, 2015 judgment entry of the Trumbull County Court of Common Pleas granting summary judgment in favor of appellee, Valley Care Health Systems of Ohio (Northside). For the following reasons, we affirm the decision of the trial court.

{¶2} Appellant was hired in 2007 in the Non-invasive Cardiology Department at Northside Medical Center ("Northside"). No employment contract was executed at the time of appellant's hiring, and she was hired as an at-will employee. Forum Health, a non-profit corporation, owned Northside at that time.

{¶3} In 2009, Forum Health declared bankruptcy. In 2010, Youngstown Ohio Hospital Company, LLC ("YOHC"), which operates as a subsidiary of Community Health Systems, Inc., acquired the assets of Forum Health. According to appellee, YOHC operates health centers as dba's, one of which was Valley Care Health Systems, and another of which is Northside. Appellant was apparently an employee of the Northside dba.

{¶4} After the acquisition of Forum Health, appellant was provided with an employee handbook, which set forth the hospital's practices, policies, and procedures, including the grievance procedure. The employee handbook provided a five-step grievance process for "non-represented" individuals, which includes appellant.

{¶5} On March 19, 2013, appellant was the subject of a patient transport incident. She was issued a formal written corrective action after she failed to transport a patient back to the patient's floor from her department following a medical procedure.

{¶6} On May 14, 2013, appellant filed a grievance arguing that she was wrongly reprimanded for the transport incident. She included a written statement with the grievance and claimed she should not have been disciplined because she was following hospital policy and procedure and honoring union rules and regulations. Her grievance was denied at the first step of the five-step grievance process.

{¶7} Appellant advanced her grievance to the second step of the process on June 7, 2013. The Chief Nursing Officer reviewed the grievance and reduced appellant's written corrective action to a verbal counseling.

{¶8} On June 25, 2013, appellant advanced her grievance to the third step. She again submitted a written statement with her grievance, claiming that hospital policy forbade her from transporting patients and that her decision not to transport a patient was consistent with policy and a collective bargaining agreement with union employees. Northside's CEO, Kirk Ray, reviewed appellant's grievance and determined that the verbal counseling would stand. On July 16, 2013, appellant appealed her grievance via step four.

{¶9} On August 2, 2013, prior to the conclusion of the grievance process, Northside announced multiple layoffs. Appellant was notified that she was being laid off as part of a reduction in force.

{¶10} In September 2013, appellant filed a claim with the National Labor Relations Board ("NLRB"). She gave a statement outlining the transport incident and grievance process. According to appellant, she later dismissed her claim with the NLRB. No further action was taken with respect to the grievance that was pending at the time of her layoff.

{¶11} On January 28, 2014, appellant filed her complaint in this action. The complaint alleged:

> Defendant knowingly promised Plaintiff a grievance process contained in the employee handbook and in so doing Plaintiff was terminated from her job * * * Defendant also breached the implied contract in this regard. As a further direct and proximate result of the facts set forth above, Defendant retaliated against Plaintiff for exercising her rights as promised by Defendant. Further,

> Defendant's action in terminating Plaintiff was against public policy and Ohio law.

{¶12} Appellee was served the summons and complaint on January 30, 2014. After appellee failed to answer the complaint by February 27, 2014, appellant filed a motion for default judgment on March 13, 2014.

{¶13} On April 9, 2014, before the trial court ruled on the motion for default judgment, appellee filed a motion for leave to file an answer instanter, asserting its answer was not filed in a timely fashion because of excusable neglect, more specifically, a clerical error. Appellee explained that appellant's summons and complaint was never forwarded to the department that evaluates complaints and forwards them to the Legal Department. The motion explained that the Legal Department never received the complaint and had no knowledge of it until April 1, 2014, when it received a notice of hearing on appellant's motion for default judgment. In support of its motion for leave to file its answer, appellee provided the trial court with five affidavits of employees who were involved in the clerical error. On April 15, 2014, the court granted appellee's motion for leave to file its answer instanter.

{¶14} On July 24, 2015, appellee filed a motion for summary judgment. On September 4, 2015, appellant responded with a memorandum in opposition to summary judgment and her own motion for summary judgment. On October 5, 2015, appellee filed a reply to appellant's brief in opposition and a brief in opposition to appellant's motion for summary judgment.

{¶15} On November 24, 2015, the Trumbull County Court of Common Pleas granted summary judgment in favor of appellee, thereby effectively denying appellant's motion for summary judgment.

{¶16} On appeal, appellant assigns the following errors:

> [1.] The trial court erred in allowing [appellee] relief from default judgment.
>
> [2.] The trial court erred in granting [appellee's] motion for summary judgment as to [appellant's] implied contract, promissory estoppel, retaliation, and discrimination claims.
>
> [3.] The trial court erred in granting [appellee's] motion for summary judgment on [appellant's] promissory estoppel claim and denying [appellant's] motion for summary judgment on the same issue.

{¶17} Appellee argues that appellant's first assignment of error is without merit because it incorrectly states the procedural history of the case. Appellant argues, in support of her first assignment of error, that the trial court should not have granted relief from judgment and sets forth arguments that relate to a trial court's grant or denial of a Civ.R. 60(B) motion for relief from judgment.

{¶18} Upon review of the record, it is clear appellee never filed a motion for relief from judgment, as there was no reason to do so. The trial court never granted judgment in favor of appellant. Appellee responded to the motion for default judgment by filing a motion for leave to file an answer instanter. The trial court's granting of the motion to file the answer effectively denied the motion for default.

{¶19} Appellee argues that appellant incorrectly cites to Civ.R. 60(B) in her argument that appellee did not make a sufficient showing of excusable neglect. Civ.R. 60(B) allows the court to relieve a party from a final judgment on motion and upon a showing of excusable neglect. Civ.R. 60(B) is inapplicable in the present case because the trial court never issued a final order granting judgment.

{¶20} Pursuant to Civ.R. 6(B)(2), the trial court had broad discretion to allow appellee leave to file an untimely answer. The rule states, in pertinent part:

> [T]he court for cause shown may at any time in its discretion * * * upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect[.]

This rule permits the court to allow an extension of time to file an answer, after the date the answer was due, on motion and upon a showing of excusable neglect. *See also State ex rel. Weiss v. Indus. Comm. of Ohio*, 65 Ohio St. 3d 470, 472 (1992).

{¶21} Appellee argues it made a showing of excusable neglect with sufficient and credible evidence, as required by Civ.R. 6(B)(2), and the trial court did not abuse its discretion in granting appellee's motion for leave to file its answer instanter.

{¶22} Whether the excusable neglect standard has been satisfied is based on the particular facts and circumstances of each case. *Marion Prod. Credit Assn. v. Cochran*, 40 Ohio St.3d 265, 271 (1988) (citations omitted). "It must appear from the record that the successfully moving party made a showing of excusable neglect sufficient to support the trial court's finding to that effect." *Id.* (finding excusable neglect in failing to reply to a counterclaim until four years after it was due). The trial court must take into account the surrounding facts and circumstances in assessing whether neglect was excusable. *Id.* The trial court's determination of excusable neglect should not be disturbed on appeal unless an abuse of discretion is shown. *Id.*

{¶23} The Ohio Supreme Court defines "excusable neglect" in the negative, stating "the inaction of a defendant is not 'excusable neglect' if it can be labeled as a 'complete disregard for the judicial system.'" *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20 (1996), quoting *GTE Automatic Elec. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 153 (1976). The Ohio Supreme Court has held that "innocent oversight" and "clerical

error" can constitute excusable neglect. *Cochran*, *supra*, at 272; *Evans v. Chapman*, 28 Ohio St.3d 132, 135 (1986).

{¶24} In the present case, the record indicates the trial court did not abuse its discretion in finding appellee's neglect was excusable. After the Legal Department received notice of the hearing to rule on appellant's motion for default judgment on April 1, 2015, and realized there was a pending case against appellee, counsel filed a motion for leave to file its answer instanter on April 9, 2015. Appellee explained the clerical error that resulted in the Legal Department never receiving or having knowledge of appellant's summons and complaint. To support its motion, appellee provided the trial court with five affidavits from people who worked in the departments where the summons and complaint went missing. These affidavits were sufficient evidence to support appellee's assertion that the Legal Department never received the complaint due to clerical error. Therefore, the trial court did not abuse its discretion in finding that appellee's neglect was excusable.

{¶25} Appellant further argues the trial court abused its discretion when it did not hold a hearing to make findings on appellee's motion for leave to file answer instanter.

{¶26} "A hearing is not an absolute prerequisite to the granting of a motion to file an untimely answer where there is sufficient evidence of excusable neglect in the record." *Jenkins v. Clark*, 7 Ohio App.3d 93 (2d Dist.1982), paragraph two of the syllabus. Appellee's five affidavits in support of its motion for leave to file answer instanter were sufficient evidence to support a finding of excusable neglect, thus the trial court was not required to hold a hearing on the motion.

{¶27} Appellant's first assignment of error is without merit.

{¶28} Appellant's final two assignments of error relate to the summary judgment motions filed by both parties.

{¶29} Summary judgment under Civ.R. 56(C) is appropriate when: "(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 party against whom the motion of summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977).

{¶30} The moving party bears the initial burden of identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If the moving party meets the initial burden, then the burden shifts to the nonmoving party to set forth specific facts that show a genuine issue of material fact exists for trial. *Fed. Home Loan Mtge. Corp. v. Zuga*, 11th Dist. Trumbull No. 2012-T-0038, 2013-Ohio-2838, ¶12, citing *Dresher*, *supra*, at 293.

{¶31} We review a trial court's decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105 (1996). Thus, this court conducts an independent review of the evidence and arguments that were before the trial court without deference to the trial court's decision. *Brown v. Cty. Commrs. of Scioto Cty.*, 87 Ohio App.3d 704, 711 (4th Dist.1993) (citation omitted).

{¶32} With regard to appellant's age and gender discrimination claim, the trial court found that appellant did not include a claim for age and gender discrimination in

her complaint, that the claim was first introduced in appellant's response to appellee's motion for summary judgment, and that it would be "prejudicial and outside the Civil Rules to permit her to add a claim for discrimination at this late stage in the proceedings without having done so via the proper channels."

{¶33} Appellant does not dispute that it is improper to add a new claim in an opposition to a motion for summary judgment, but instead asserts that her complaint did contain a claim for age and gender discrimination. In her appellate brief, she argues that her claims for termination in violation of public policy and for discrimination "are both the same claim." She asserts that her allegation "at paragraph 18 of the complaint that 'defendant's action in terminating plaintiff was against public policy and Ohio law'" states the claim for both a violation of public policy and discrimination.

{¶34} Under Civ.R. 8(A), a pleading sets forth a claim for relief when it contains "(1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled." *See also Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, ¶25.

{¶35} The complaint does not need to state with precision all of the elements that give rise to a legal basis of recovery, but it should give fair notice of the nature of the action. *McWreath v. Cortland Bank*, 11th Dist. Trumbull No. 2010-T-0023, 2012-Ohio-3013, ¶40, citing *Bridge v. Park Natl. Bank*, 10th Dist. Franklin No. 03AP-380, 2003-Ohio-6932, ¶5. "Under the notice pleading requirements, 'to constitute fair notice, the complaint must still allege sufficient underlying facts that relate to and support the alleged claim, and may not simply state legal conclusions.'" *Id.* quoting *Gonzalez v. Posner*, 6th Dist. Fulton No. F-09-017, 2010-Ohio-2117, ¶11.

{¶36} Ohio Courts have repeatedly held that a plaintiff is generally limited to the allegations in her pleading and cannot enlarge her claims in a memorandum in opposition to summary judgment. *See Alden v. Kovar*, 11th Dist. Trumbull Nos. 2007-T-0114 & 2007-T-0115, 2008-Ohio-4302, ¶72, quoting *Scassa v. Dye*, 7th Dist. Carroll No. 02CA0779, 2003-Ohio-3480, ¶27; *see also Karsnak v. Chess Fin. Corp.*, 8th Dist. Cuyahoga No. 97312, 2012-Ohio-1359, ¶48.

{¶37} Appellant's complaint does not give fair notice of a claim for age and gender discrimination, as it fails to set forth any facts that relate to a discrimination claim. Appellant did not assert a claim for age and gender discrimination in her pleading, therefore she could not assert it for the first time in her memorandum in opposition to summary judgment.

{¶38} The trial court was correct in granting appellee's motion for summary judgment with regard to appellant's age and gender discrimination claim.

{¶39} Appellee argues, with regard to appellant's second assignment of error, that appellant did not establish a prima facie case of retaliatory discrimination. Appellee contends appellant was not engaged in any protected activity because her grievance was not filed in opposition to an unlawful discriminatory action by her employer.

{¶40} Appellant's claim for retaliatory discrimination is brought pursuant to R.C. 4112.02(I), which provides that it is an unlawful discriminatory practice "[f]or any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section."

{¶41} In its motion for summary judgment, appellee submitted, among other evidentiary material, the affidavit of Marsha Kenyhercz, R.N., the Director of Peri-

Operative Services and appellant's manager. This affidavit sets forth the criteria used in deciding to lay off appellant. This criteria set forth a valid, non-discriminatory reason for the layoff and specifically denied that the pending grievance was considered in the determination. This affidavit was sufficient to shift the burden to appellant to defeat summary judgment on the retaliation claim.

{¶42} To prevail on her retaliation claim, appellant must establish a prima facie case of retaliatory discrimination. *Butler v. Lubrizol Corp.*, 11th Dist. Lake No. 2014-L-104, 2015-Ohio-1216, ¶30. Appellant must prove that (1) she engaged in a protected activity, (2) appellee was aware that she had engaged in that activity, (3) appellee took an adverse employment action against appellant, and (4) there is a causal connection between the protected activity and the adverse action. *Id.* Filing a grievance unrelated to an employer's discriminatory activity cannot form the basis for a retaliation claim. *See Motley v. Ohio Civ. Rights Comm.*, 10th Dist. Franklin No. 07AP-923, 2008-Ohio-2306, ¶15.

{¶43} In the written statements that accompanied her grievance at different steps of the process, appellant stated she was "disciplined for following hospital policy and honoring union rules and regulations." Appellant filed her grievance because she thought she was wrongly disciplined for a transport incident, not in opposition to a discriminatory practice by her employer. Therefore, her filing of the grievance is not a protected activity and cannot form the basis of a retaliatory discrimination claim.

{¶44} Appellant cites *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253 (4th Cir.1998) in support of her assertion that filing any informal grievance constitutes an activity that merits protection under Title VII.

{¶45} Appellant has misinterpreted *Laughlin*, which states, "[o]pposition activity encompasses utilizing informal grievance procedures * * * in order to bring attention to an employer's *discriminatory activities*." *Id.* at 259 (emphasis added). *Laughlin* is consistent with the above-cited case law that holds filing a grievance is protected activity only when it is filed to bring attention to an employer's discriminatory actions.

{¶46} The trial court was correct in holding that appellant, as a matter of law, did not engage in a protected activity and, therefore, did not establish a prima facie case for retaliatory discharge.

{¶47} With regard to appellant's final assignment of error, appellee argues that an alleged promise made after appellant was notified of her termination cannot form the basis of a claim of promissory estoppel.

{¶48} The doctrine of employment at-will generally governs employment relationships in Ohio where there is no specific employment contract. *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, ¶5. Absent an employment contract, an employer may terminate an employee for any lawful reason or for no reason at all. *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100 (1985), paragraph one of the syllabus.

{¶49} Ohio recognizes the claim of promissory estoppel as an exception to the general rule of employment at-will. It provides that when a promise, which the employer should reasonably expect to induce action or forbearance on the part of the employee, does induce such action or forbearance, a cause of action may exist if injustice can be avoided only by enforcement of the promise. *Id.* at 104 (citations omitted). "The representation made by the employer must amount to a specific promise of job security

or continued employment." *Patrick v. Bakeris*, 11th Dist. Trumbull No. 2004-T-0114, 2005-Ohio-4901, ¶17.

{¶50} Appellant's allegation that Mr. Ray, Northside's CEO, promised "that despite her termination the grievance process would continue through the five steps" is insufficient to form the basis of a claim for promissory estoppel because the alleged statement was not a promise of job security or continued employment. The statement, taken as true for purposes of the motion for summary judgment, induced no action or forbearance on the part of appellant with regard to her continued employment.

{¶51} Furthermore, in her motion for summary judgment and in her appellate brief, appellant does not set forth any citation to authority with regard to promissory estoppel and does not connect any facts to the elements of promissory estoppel in order to show there is no issue of material fact and that she is entitled to judgment as a matter of law. Therefore, appellant is not entitled to summary judgment.

{¶52} The trial court was correct in granting summary judgment in favor of appellee on appellant's promissory estoppel claim.

{¶53} The decision of the Trumbull County Court of Common Pleas granting summary judgment in favor of appellee is affirmed.

THOMAS R. WRIGHT, J.,

COLLEEN MARY O'TOOLE, J.,

concur.