

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JAMES CARPENTER	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellant	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
BISHOP WELL SERVICES CORP.	:	Case No. 2009CA00027
	:	
Defendant-Appellee	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 2006CV04550

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: December 7, 2009

APPEARANCES:

For Plaintiff-Appellant

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Farmer, P.J.

{¶1} Appellant, James Carpenter, worked for appellee, Bishop Well Services Corporation. On May 31, 2006, appellant was let go. On June 20, 2006, appellant filed a complaint with the United States Department of Labor's Occupational Health and Safety Administration (hereinafter "OSHA"), claiming he was discharged in violation of the whistleblower statutes. A hearing commenced on October 31, 2006. By decision dated March 6, 2007, the administrative law judge determined appellant had been discharged for legitimate business reasons. Appellant appealed the decision.

{¶2} While the matter was pending, appellant filed a complaint against appellee in the Court of Common Pleas of Stark County, Ohio on November 27, 2006. Appellant alleged wrongful discharge in violation of public policy and R.C. 4123.90. Appellant alleged he was fired because he had called OSHA about unsafe working conditions, and because he had filed a workers' compensation claim against appellee.

{¶3} On July 31, 2007, appellant filed a motion for partial summary judgment regarding appellee's affirmative defenses.

{¶4} On August 15, 2007, appellee filed a motion for summary judgment on appellant's claims. On September 17, 2007, the trial court stayed the matter pending the decision by the Administrative Review Board.

{¶5} Pursuant to a writ of procedendo issued by this court on November 3, 2008, the trial court proceeded with the case. By judgment entry filed January 23, 2009, the trial court granted appellee's motion for summary judgment, and granted appellant's motion for summary judgment as to appellee's affirmative defense of vexatious litigator.

{¶6} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶7} "DISPUTED ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT."

II

{¶8} "THE TRIAL COURT ERRS AS A MATTER OF LAW IN HOLDING THAT OHIO DOES NOT RECOGNIZE A PUBLIC POLICY TORT CLAIM FOUNDED ON ENVIRONMENTAL, HEALTH AND SAFETY WHISTLEBLOWING."

III

{¶9} "THE TRIAL COURT ERRED IN RELYING ON A RECOMMENDED DECISION WHICH IS NOT YET FINAL UNDER THE RULES OF THE U.S. DEPARTMENT OF LABOR."

IV

{¶10} "THE TRIAL COURT ERRED IN DENYING CARPENTER'S MOTION TO STRIKE THE DEPOSITION TRANSCRIPT WHEN THE OPPOSING PARTY FAILED TO GIVE CARPENTER'S COUNSEL IN THIS MATTER NOTICE OF THAT DEPOSITION."

I

{¶11} Appellant claims the existence of genuine issues of material fact which precluded the trial court from granting summary judgment to appellee. We disagree.

{¶12} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶13} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined 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. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶14} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

{¶15} Appellant's claims are two-fold: 1) a public policy tort claim (wrongful discharge) pursuant to *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.2d 228, and 2) a retaliatory discharge claim pursuant to R.C. 4123.90. The trial court determined *Bickers v. W. & S. Life Ins. Co.*, (2007), 116 Ohio St.3d 351, barred appellant's public policy wrongful discharge claim pursuant to R.C. 4123.90, and the retaliatory discharge claim was barred under the doctrine of collateral estoppel. Even if

the doctrine of collateral estoppel did not apply, the trial court determined appellant did not establish the elements to support his public policy claim for wrongful discharge.

{¶16} In its judgment entry on summary judgment filed January 23, 2009, the trial court adopted the lengthy "Summary of the Evidence" as set forth in the "Recommended Decision and Order" by the Department of Labor Administrative Law Judge issued on March 6, 2007. In determining both of appellant's claims, the trial court relied on the doctrine of collateral estoppel via the Administrative Law Judge's decision and order.

{¶17} Appellant argues collateral estoppel does not apply in this case because the recommendations of the Administrative Law Judge did not constitute a final judgment. Appellant had timely petitioned for review with the Department of Labor's Administrative Review Board. At the time of the trial court's decision, the petition for review was still pending. While the matter sub judice was on appeal, a final decision was entered. It is within this framework that we will address the assignment of error.

PUBLIC POLICY CLAIMS

{¶18} Appellant argues his claim for public policy tort for wrongful discharge should not have been dismissed.

{¶19} In *Painter v. Graley* (1994), 70 Ohio St.3d 377, 1994-Ohio-334, fn. 8, the Supreme Court of Ohio noted the following:

{¶20} "In reviewing future cases, Ohio courts may find useful the analysis of Villanova Law Professor H. Perritt, who, based on review of cases throughout the country, has described the elements of the tort as follows:

{¶21} " '1. That clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the *clarity* element).

{¶22} " '2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the *jeopardy* element).

{¶23} " '3. The plaintiff's dismissal was motivated by conduct related to the public policy (the *causation* element).

{¶24} " '4. The employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element).' (Emphasis *sic*.)

{¶25} "H. Perritt, *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?* (1989), 58 U.Cin.L.Rev. 397, 398-399."

{¶26} The *Painter* court at 384 noted the decision of whether there has been a violation of a clear public policy is a determination as a matter of law.

{¶27} In reviewing the factors enumerated in *Painter*, we find appellant's public policy tort for wrongful discharge based on whistleblowing fails under the "jeopardy" element i.e., appellant's dismissal would jeopardize the public policy contained in Ohio's whistleblowing statutes.

{¶28} In *Leininger v. Pioneer National Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, the Supreme Court of Ohio re-examined prior decisions involving a jeopardy analysis. Justice Lanzinger, writing for the majority, stated the following at ¶27:

{¶29} "It is clear that when a statutory scheme contains a full array of remedies, the underlying public policy will not be jeopardized if a common-law claim for wrongful discharge is not recognized based on that policy. The parties question what should

happen if a statutory scheme offers something less than complete relief. Appellants urge this court to follow *Wiles* [*v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994], while appellee and her amici curiae advocate reliance on *Kulch* [*v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134]; both *Wiles* and *Kulch* are plurality opinions with regard to the issue pertinent to this case. After considering our prior decisions, we conclude that it is unnecessary to recognize a common-law claim when remedy provisions are an essential part of the statutes upon which the plaintiff depends for the public policy claim and when those remedies adequately protect society's interest by discouraging the wrongful conduct."

{¶30} In its brief at fn. 2, appellee alleges appellant's public policy tort claim arose from the following federal and Ohio statutes:

{¶31} "Carpenter alleges that he was wrongfully discharged in violation of the various public policies underlying ten federal statutes, including Section 11(C) of the Occupational Safety and Health Act (he failed to perfect this claim), the Toxic Substances Control Act, the Clean Air Act, the Water Pollution Control Act, the Safe Water Drinking Act, the Solid Waste Disposal Act, the Energy Reorganization Act of 1974, the Comprehensive Environmental Response, Compensation and Liability Act, and the Pipeline Safety Improvement Act, and six Ohio statutes, including ORC Chapter 3704 (Air Pollution Control), 3734 (Solid and Hazardous Wastes), 4123 (Workers' Compensation), 6109 (Safe Drinking Water), 6111 (Water Pollution Control) and 6117 (Sewer Systems)."

{¶32} As we review appellant's response to appellee's motion for summary judgment, we find two actions that appellant attributes to his wrongful discharge. The

first is his call to OSHA relative to safety violations. The second is his filing of a workers' compensation claim.

{¶33} In his October 27, 2006 deposition at 58-59, appellant described why he called OSHA:

{¶34} "Well, following my accident when I did return to work, I had still seen there weren't a whole lot of safety procedures had changed and that accident could have happened and hurt anybody. That hose could have burst in the middle of the night, maybe not on that well, but any other well and the gas and oil and brine could have been released without being found for quite awhile and could have gotten in the waters. I guess there were a few reasons and none of them was retaliation or anything. We had never had any safety meetings. Well, actually one with a company booklet had some safety in it and it could have had like the line could have busted in the middle of the night and we don't know what all could have happened and what all could have been released and where it went."

{¶35} Under a Civ.R. 56 standard, factual issues are to be construed in favor of the non-moving party. From the various depositions, we presume 1) the OSHA inspection which was conducted after appellant's call was precipitated by the call, 2) appellee suspected appellant had called OSHA, and 3) the call to OSHA precipitated appellant's discharge.

{¶36} Despite construing the facts in appellant's favor, we find the federal OSHA statutes in Section 660(c), Title 29, U.S.Code, provide for judicial review and a judicial remedy, as well as reinstatement, back pay, exemplary damages, interest, injunctive relief, and expungement of employee's record. The other federal statutes cited,

although not at issue for the facts alleged, provide similar penalties for unlawful discharge or discrimination.

{¶37} Ohio's "whistleblower" statute, R.C. 4113.52, provides for parallel civil remedies for retaliation discharge. See, Subsections (B) and (C).

{¶38} Based upon the clear mandate of the *Leininger* standard, the causes of action alleged by appellant under a public policy tort claim fails to meet the "jeopardy" element test.

{¶39} Further, the *Bickers* case cited supra at syllabus prohibits a public policy tort claim for wrongful discharge based upon a workers' compensation claim:

{¶40} "An employee who is terminated from employment while receiving workers' compensation has no common-law cause of action for wrongful discharge in violation of the public policy underlying R.C. 4123.90, which provides the exclusive remedy for employees claiming termination in violation of rights conferred by the Workers' Compensation Act. (*Coolidge v. Riverdale Local School Dist.*, 100 Ohio St.3d 141, 2003-Ohio-5357, 797 N.E.2d 61, limited.)"

WORKERS' COMPENSATION CLAIM

{¶41} Apart from the public policy arguments, appellant claims retaliation discharge pursuant to R.C. 4123.90. Appellant argues in construing the evidence most favorably to this claim, he established the discharge was a result of a "contentious" workers' compensation hearing. Appellee argues the decision to terminate appellant was a result of a complaint from its biggest customer and a decision to end light duty work.

{¶42} Appellee argues it produced legitimate non-retaliatory reasons for the discharge. See, *Boyd v. Winton Hills Medical & Health Center, Inc.* (1999), 133 Ohio App. 3d 150. Appellant bears the burden to establish the reasons for his discharge were pretextual. Except for the proximity of the timing of the workers' compensation hearing and appellant's termination, no other evidence other than innuendo was offered to the trial court. Appellee argues appellant stated "he was not sure***how he [Dave] retaliated. I mean, what is in his mind, is in his mind.***I am not sure that he did anything wrong, that is not my call." June 27, 2007 Carpenter depo. at 45. Although the quotation is correct, we do not find it to be an admission against appellant's interest.

{¶43} Undisputed is the fact that appellant had reached his MMI (maximum medical improvement), and he was not eligible to receive temporary total disability. Bishop aff. at ¶9. There was no further economic benefit to appellee to continue appellant's light duty work. Bishop's affidavit affirms that the decision to terminate appellant was related to that economic fact.

{¶44} In its brief at fn. 1, appellee explained MMI as follows:

{¶45} "Maximum medical improvement ('MMI') as defined by workers compensation statute, represents a point where it is unlikely that there will be any physiological improvement in the conditions caused by the accident regardless of any further treatment. At that point, the injured worker is no longer eligible for temporary total disability benefits ('TTD'). ORC§4123.56 (A). Payment of TTD causes an increase in the employer's workers compensation premium and may cause it to be ineligible to participate in a workers compensation pooling group, which could increase the premium by thousands of dollars or more each year. Payment of wage continuation in lieu of

TTD is a way to avoid this increase in premium and the risk of elimination from the pooling group. A worker who refuses a written offer of a light duty position within his physician's restrictions forfeits his right to receive TTD.***"

{¶46} Appellant's subsequent efforts through the Workers' Compensation Commission resulted in a denial of a claim for additional medical condition (Case No. 2007CV01588).

{¶47} We find appellant has failed to rebut or establish a prima facie case that appellee's motivation for his termination was pretextual under R.C. 4123.90.

{¶48} Assignment of Error I is denied.

II

{¶49} Appellant claims the trial court erred in finding no public policy tort claim on environmental whistleblowing. We disagree.

{¶50} Appellant re-argues that the jeopardy standard as applied in *Leininger* does not apply when there are multiple-source public policies involved. Although it is true that *Leininger* addresses the issue of only one statute, its dicta cannot be overlooked.

{¶51} Here, the statutes for "whistleblowers" offer a statutory scheme for complete relief (R.C. 4115.35). In discussing multiple-source public policies, Justice Lanzinger in *Leininger* at ¶26 noted the court's decision in *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, ¶15:

{¶52} "We noted that '[a]n analysis of the jeopardy element necessarily involves inquiring into the existence of any alternative means of promoting the particular public policy to be vindicated by a common-law wrongful-discharge claim.***Simply put, there

is no need to recognize a common-law action for wrongful discharge if there already exists a statutory remedy that adequately protects society's interests.' "

{¶53} Assignment of Error II is denied.

III

{¶54} Appellant argues that the doctrine of collateral estoppel is not applicable because there was no final judgment by the Administrative Review Board. We agree, however, this decision does not affect the outcome.

{¶55} "The doctrine of res judicata involves both claim preclusion (historically called estoppel by judgment in Ohio) and issue preclusion (traditionally known as collateral estoppel)." *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 381. Under the claim-preclusive branch of res judicata, "[a] final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction***is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them." *Norwood v. McDonald* (1943), 142 Ohio St. 299, paragraph one of the syllabus.

{¶56} Despite this finding, we do not believe the ultimate decision to grant summary judgment is error based upon Assignments of Error I and II.

{¶57} Assignment of Error III is granted, but does not affect the outcome.

IV

{¶58} Appellant claims the trial court erred in not striking his June 27, 2006 deposition since his current counsel was not present for the deposition. We disagree.

{¶59} As noted in the deposition, appellant was represented by Leland G. Vincent, II. This deposition was taken for the workers' compensation case (Case No.

2007CV01588) and thereafter filed in the matter sub judice. At the end of the deposition, appellant waived his right to review the deposition.

{¶60} Clearly, the deposition would qualify under Evid.R. 801(D). Therefore, we find the trial court did not err in denying appellant's request to strike the deposition.

{¶61} Assignment of Error IV is denied.

{¶62} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, P.J.

Hoffman, J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ William B. Hoffman

s/ Patricia A. Delaney

JUDGES

SGF/sg 1104

