

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DAWN THOMPSON, ET AL.

Plaintiffs-Appellants

-vs-

DEPARTMENT OF MENTAL
RETARDATION AND
DEVELOPMENTAL DISABILITIES
OF FAIRFIELD COUNTY, OHIO

Defendant-Appellee

JUDGES:

Hon. Sheila G. Farmer, P.J.
Hon. W. Scott Gwin, J.
Hon. William B. Hoffman, J.

Case No. 09CA00041

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 2008CV538

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

December 7, 2009

APPEARANCES:

For Plaintiffs-Appellants

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For Defendant-Appellee

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Farmer, P.J.

{¶1} On March 6, 2006, appellant, Dawn Thompson, became employed with appellee, Department of Mental Retardation and Developmental Disabilities of Fairfield County, Ohio. As an employee for appellee, appellant was part of a bargaining unit which was bound by the Master Agreement between Forest Rose Education Association and appellee. The Master Agreement covered terms and conditions of employment, wages, and other matters. On February 9, 2007, appellant was terminated.

{¶2} On April 23, 2008, appellant, together with her husband, Lee Thompson, filed a complaint against appellee with the Court of Common Pleas of Fairfield County, Ohio, claiming breach of contract, wrongful discharge, and loss of consortium. All parties filed motions for summary judgment. Appellee claimed appellant's sole and exclusive remedy was binding grievance and arbitration procedures pursuant to the Master Agreement. By judgment entry filed June 10, 2009, the trial court agreed, granted summary judgment to appellee, and denied appellants' motion for summary judgment.

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

I

{¶4} "WHETHER THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS, DAWN THOMPSON AND LEE THOMPSON, AS A MATTER OF LAW, IN DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, VIA ITS JUDGMENT ENTRY OF JUNE 10, 2009."

II

{¶5} "WHETHER THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS, DAWN THOMPSON AND LEE THOMPSON, AS A MATTER OF LAW, IN GRANTING THE MOTION FOR SUMMARY JUDGMENT OF DEFENDANT, DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES FOR FAIRFIELD COUNTY, OHIO, VIA ITS JUDGMENT ENTRY OF JUNE 10, 2009."

I, II

{¶6} Appellants claim the trial court erred in denying their motion for summary judgment and granting summary judgment to appellee. We disagree.

{¶7} 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:

{¶8} "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."

{¶9} 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.

{¶10} As a bargaining unit member, appellant was subject to the Master Agreement between appellee and the Forest Rose Education Association. When first hired, appellant was subject to a probationary period. At the conclusion of this period, appellant became a non-probationary employee who could not be disciplined or discharged except for just cause. Procedures for termination and any subsequent disputes arising therefrom are included in the Master Agreement.

{¶11} It is undisputed that appellant was hired as a nurse to commence on March 6, 2006. Pursuant to a Position Description, attached to appellants' complaint as Plaintiff's Exhibit B, both appellant and appellee agreed to a 300 day probationary period. Appellant was terminated on February 9, 2007. This date was after the expiration of the 300 day probationary period (January 1, 2007). Although the procedures for termination were not followed, appellant did not seek to grieve the termination pursuant to the grievance procedure set forth in Article 3 of the Master Agreement.

{¶12} In granting summary judgment to appellee, the trial court found when appellant was terminated on February 9, 2007, she was "no longer a probationary employee. Thus, her sole and exclusive remedy was through the grievance and arbitration procedure of the Master Agreement." See, Judgment Entry filed June 10, 2009. Appellants argue the trial court erred in so finding and in support, cite to Article 5 (Job Protection), subsection (A)(3) of the Master Agreement which states the following:

{¶13} "The probation period of newly hired unit members shall be the number of scheduled work days in that individual's work year. The Employer has the discretion to end a probation period early, however the decision not to do so may not be grieved. Newly hired probationary unit members serve at the Employer's discretion. They have no right to grieve any dismissal."

{¶14} Based upon this exclusion, appellants argue they have the right to pursue their claims through the Court of Common Pleas. Because appellant was not treated as a non-probationary employee i.e., not given just cause or a hearing, she was considered a probationary employee and could not file a grievance pursuant to said section.

{¶15} Under R.C. 4117.10(A), if an agreement provides for final and binding arbitration as an exclusive remedy, the agreement prevails:

{¶16} "(A) An agreement between a public employer and an exclusive representative entered into pursuant to this chapter governs the wages, hours, and terms and conditions of public employment covered by the agreement. If the agreement provides for a final and binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure and the state personnel board of review or civil service commissions have no jurisdiction to receive and determine any appeals relating to matters that were the subject of a final and binding grievance procedure.***[T]his chapter prevails over any and all other conflicting laws, resolutions, provisions, present or future, except as otherwise specified in this chapter or as otherwise specified by the general assembly."

{¶17} In Article 3(A)(1), the Master Agreement states the grievance procedure "shall be the exclusive method of resolving disputes under this Agreement." Subsection (A)(2) defines a grievance as "any claim that a specific provision of this Agreement has been violated, misinterpreted or misapplied." The grievance procedure provides for informal procedure followed by four levels of formal procedure. See, Article 3(B) and (C). Article 5(E)(5) states "[a]ppeals from either discharge or suspension must be appealed in the form of a grievance of Level 2 (Superintendent's step) of the grievance procedure within ten (10) calendar days of the date of notification of the action."

{¶18} It is clear from the Position Description that appellant was not a probationary employee at the time of her termination. Therefore, appellants' argument that Article 5(A)(3) cited supra somehow excludes her set of facts from the grievance procedure is not well taken. The plain and unambiguous meaning of said section applies to the discretionary shortening of a probationary period. In other words, if an employer declines to shorten a probationary period set by the Master Agreement, an employee cannot challenge the decision. However, if appellant disputed her probationary status at the time of her termination, she had the right to follow the grievance procedure set forth in the Master Agreement, claiming "a specific provision of this Agreement has been violated, misinterpreted or misapplied." See, Article 3(A)(2).

{¶19} Upon review, we find the trial court did not err in denying appellants' motion for summary judgment, granting summary judgment to appellee, and dismissing the collateral consortium claim.

{¶20} Assignments of Error I and II are denied.

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

By Farmer, P.J.

Gwin, J. and

Hoffman, J. concur.

/ Sheila G. Farmer

s/ W/ Scott Gwin

s/ William B. Hoffman

JUDGES

SGF/sg 1118

