[Cite as *Jones v. Goodyear Tire & Rubber Co.*, 2004-Ohio-2821.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

PAUL JONES, JR., et al. Appellants v. THE GOODYEAR TIRE AND RUBBER COMPANY Appellee	C .A. No. 21724 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. cv 2002 09 5090

DECISION AND JOURNAL ENTRY

Dated: June 2, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Presiding Judge.

{¶1} Appellants, Paul Jones, Jack McGilvrey, Thomas Polk, and Marvin Tipton ("Appellants"), appeal from a judgment of the Summit County Court of Common Pleas that dismissed their discrimination complaint against the Goodyear Tire & Rubber Company ("Goodyear")[1]. This Court reverses and remands.I.

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[1] Although the case below involved several other plaintiffs, some of whose claims against Goodyear are still pending, the trial court found, nunc pro tunc, that

I.

{¶2} Appellants filed their complaint in this action on September 12, 2002. Because this appeal stems from the dismissal of a complaint pursuant to Civ.R. 12(B)(6), this Court accepts the facts alleged in the complaint as true. Appellants are current and former long-time, salaried employees of Goodyear and each is over the age of forty. This cause of action stems from an employee performance review system that Goodyear implemented in 2001. Under the new system, a letter grade of A (excels), B (competes well), or C (requires improvement) is assigned to each employee reviewed, with a stated goal of ten percent of the subject workforce receiving "A"s, eighty percent receiving "B"s, and ten percent receiving "C"s. Appellants alleged that Goodyear was using the review system to discriminate against them and other employees because of their age and that they had suffered damages as a result.

{¶3} Appellant Jones alleged that he had always received good annual performance reviews prior to 2001, that he received a "C" rating in 2001, and that he did not deserve a "C" rating, but had received it as part of Goodyear's plan to discriminate against older employees. On June 12, 2002, Goodyear informed Jones that he had to either agree to accept a separation package or be placed on a sixty-day improvement plan. Because he did not agree to resign, Goodyear placed

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there was no just cause to delay the Appellants from appealing the dismissal of their claims. See Civ.R. 54(B).

Jones on a sixty-day improvement plan and if, at the end of that period management determined his performance to be unacceptable, Goodyear told Jones that he would be terminated.

{¶4} Prior to 2001, Appellant McGilvrey had received "good/effective" or "highly effective" annual performance evaluations. On March 15, 2001, McGilvrey received a "C" rating, which he alleged he did not deserve, but had received as part of Goodyear's plan to discriminate against older employees. On May 3, 2002, McGilvrey received a second "C" rating and Goodyear terminated him. McGilvrey alleged that he did not deserve the second "C" rating, but that he had received it as part of Goodyear's plan to discriminate against older employees.

{¶5} Prior to 2001, Appellant Polk had received "effective" or "very effective" annual performance evaluations. On March 19, 2001, Polk received a "C" rating, which he also alleged was not warranted, but was part of Goodyear's plan to discriminate against older employees. On April 17, 2002, Polk received a second "C" rating and was ineligible to receive a raise or bonus and was warned that he may be subject to discharge. Polk alleged that the second "C" rating was not warranted, but was part of Goodyear's plan to discriminate against older employees.

{¶6} Appellant Tipton had received "highly effective" and "good/effective" performance evaluations prior to 2001. In May 2001, Tipton received a "C" rating. He also alleged that he did not deserve a "C" rating, but

that he had received it as part of Goodyear's plan to discriminate against older employees. Goodyear denied Tipton's request to transfer to another department, falsely claiming that the transfer would violate company policy. On May 6, 2002, Tipton received a second "C" rating and was told that his termination was imminent. Goodyear forced him to use his unused vacation time and then retire.

{¶7} On November 15, 2002, Goodyear moved to dismiss Appellants' complaint,[2] alleging that their statutory age discrimination claims were barred by the statute of limitations. Goodyear further asserted that Appellants' common law claims should be dismissed because Ohio's age discrimination statutes provided them with sufficient rights and remedies. The trial court granted those aspects of the motion and dismissed Appellants' claims. The trial court later certified the order for interlocutory appeal pursuant to Civ.R. 54(B), finding "no just cause for delay."

{¶8} Appellants appeal and raise two assignments of error.

I.

{¶9} Initially, this Court must address Goodyear's motion to dismiss the appeal of Jack McGilvrey, which was filed after the oral argument in this case. According to a statement made by Goodyear's counsel at oral argument, and substantiated by evidence that it attached to its motion to dismiss, McGilvrey

[2] Goodyear also moved to dismiss several other plaintiffs from the action, but those aspects of the motion are not at issue in this appeal.

passed away on March 4, 2003, more than three months before the trial court entered the judgment that is on appeal to this Court. Goodyear asserts that, because McGilvrey is now deceased and no party was ever substituted for him in the trial court, this Court lacks jurisdiction to hear his portion of the appeal.

{¶10} Goodyear has failed to demonstrate, however, how this Court has authority to consider the materials that it attached to its motion to dismiss, materials that are not part of the trial court record. It would be an entirely different matter if the evidence outside the record demonstrated that a party had died after the trial court entered its judgment, see App.R. 29, or if the trial court record affirmatively demonstrated that a party had died during the trial court proceedings and was not properly substituted. See, e.g., *Schectman v. Manitsas* (Mar. 26, 1990), 12th Dist. No. CA89-04-56; *Nielsen-Mayer v. Nielsen-Mayer* (Mar. 15, 2001), 8th Dist. No. 77112. Goodyear asserts, however, that McGilvrey died during the trial court proceedings and the trial court record is silent as to that fact. This Court's review of the trial court proceedings is limited to the trial court record, and materials submitted directly to this Court cannot be added to the record on appeal. See *Lamar v. Marbury* (1982), 69 Ohio St.2d 274, 277, citing App.R. 12(A) and App.R. 9(A). This is a matter that the parties should address on remand to the trial court. Consequently, the motion to dismiss the appeal of Jack McGilvrey is denied.

FIRST ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRONEOUSLY DISMISSED THE AGE DISCRIMINATION CLAIMS OF APPELLANTS JONES, MCGILVREY, POLK, AND TIPTON AS TIME-BARRED."

{¶11} Through their first assignment of error, Appellants contend that the trial court erred in dismissing their claims as being time-barred. This Court begins its analysis by stressing that this is an appeal from the dismissal of Appellants' complaint. The standard of review for the dismissal of a complaint pursuant to Civ.R. 12(B)(6) is well-settled:

> "The factual allegations of the complaint and items properly incorporated therein must be accepted as true. Furthermore, the plaintiff must be afforded all reasonable inferences possibly derived therefrom. It must appear beyond doubt that plaintiff can prove no set of facts entitling her to relief." (Citations omitted.) *Vail v. The Plain Dealer Publishing Co*. (1995), 72 Ohio St.3d 279, 280.

{¶12} A motion to dismiss a complaint on the bar of the statute of limitations is erroneously granted unless the complaint, on its face, conclusively shows that the action is time-barred. *Velotta v. Leo Petronzio Landscaping, Inc.* (1982), 69 Ohio St.2d 376, paragraph three of the syllabus. It is the burden of the defendant, not the plaintiff, to plead the affirmative defense of the statute of limitations. *Tarry v. Fechko Excavating, Inc.* (Nov. 3, 1999), 9th Dist. No. 98CA007180. Consequently, to survive a Civ.R. 12(B)(6) motion, a plaintiff's complaint need not disprove the statute of limitations defense. As long as there is a set of facts consistent with the complaint that would allow the plaintiff to recover, dismissal under Civ.R. 12(B)(6) is not proper. Id.

{¶13} In its motion to dismiss, Goodyear asserted and the trial court agreed, that the appropriate statute of limitations is set forth in R.C. 4112.02(N), which provides that a civil action must be commenced within one hundred eighty days after "the alleged unlawful discriminatory practice occurred[.]"[3] In addition to R.C. 4112.02(N), the trial court relied on the legal principle, as set forth in *McCray v. Springboro* (July 13, 1998), 12th Dist. No. CA98-01-006, that the statute of limitations runs from the discriminatory act, not from the consequences of that act. The trial court found that Appellants' claims were time-barred because each plaintiff had alleged a discriminatory act, his first "C" rating, which had occurred more than one hundred eighty days before the complaint was filed.

{¶14} In *McCray*, however, there was a single discriminatory act alleged by the plaintiffs, and all subsequent acts by the employer were merely ministerial consequences of that act. As this Court explained in *Yovanno v. Ryder System, Inc.*, 9th Dist. No. 21528, 2003-Ohio-6824, after noting that Ohio courts look to federal discrimination law in interpreting R.C. Chapter 4112, the United States Supreme Court has recognized that a complaint in age discrimination may allege multiple discriminatory acts, each triggering a new limitations period.

> "'Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- *** day time period after the discrete discriminatory act occurred. The existence of past acts and the employee's prior

[3] For purposes of this argument, this Court will assume, without deciding, that the trial court applied the appropriate statute of limitations.

> knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed.'" *Yovanno*, quoting *National Railroad Passenger Corp. v. Morgan* (2002), 536 U.S. 101, 122, 153 L.Ed.2d 106.

{¶15} Although *Morgan* did not set forth an exhaustive list of the types of acts that would constitute discrete discriminatory acts, some "easy to identify" examples included "termination, failure to promote, denial of transfer, or refusal to hire[.]" *Morgan*, 536 U.S. at 114. It has been held that an allegedly discriminatory performance evaluation constitutes a discrete discriminatory act. *Miller v. N.H. Dept. of Corrections* (C.A.1, 2002), 296 F.3d 18, 22. Likewise, a workload review that is alleged to be discriminatory is a discrete discriminatory act because it also involves an assessment of an employee's performance by an immediate supervisor. *O'Dwyer v. Snow* (Mar. 10, 2004), S.D.N.Y. No. 00 Civ. 8918.

{¶16} So long as Appellants' complaint can be read to allege, as to each plaintiff, a discrete discriminatory act by Goodyear that occurred within one hundred eighty days of filing the complaint, dismissal of their complaint was improper. The complaint was filed on September 12, 2002. Thus, any discrete discriminatory acts alleged by Appellants that occurred on or after March 16, 2002 would fall within the one-hundred-eighty-day statute of limitations of R.C. 4112.02(N).

{¶17} Appellant Jones alleged that, in addition to receiving a "C" rating in 2001, the following discrete discriminatory acts occurred within the limitations period. On June 12, 2002, he was forced to accept a separation package or be placed on a sixty-day improvement plan. At the time the complaint was filed, Jones was on the performance improvement plan and, if Goodyear's management evaluated his performance as unimproved, he would be terminated.

{¶18} Appellants McGilvrey and Polk also alleged discrete discriminatory acts that occurred within the limitations period. Each alleged that they received a second "C" performance rating. McGilvrey received his second "C" on May 3, 2002; Polk received his second "C" on April 17, 2002. McGilvrey further alleged that Goodyear terminated him within one hundred eighty days of filing the complaint.

{¶19} Appellant Tipton likewise alleged discrete discriminatory acts that occurred after March 16, 2002. He alleged that he received his second "C" rating on May 6, 2002 and was told that his termination was imminent. He was later forced to retire.

{¶20} Because Appellants each did allege discrete discriminatory acts that occurred less than one hundred eighty days before they filed their complaint, the trial court erred in dismissing their statutory claims. The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN GRANTING GOODYEAR'S MOTION TO DISMISS PLAINTIFFS-APPELLANTS' SECOND CAUSE OF ACTION FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY."

{¶21} Next, Appellants contend that the trial court erred in dismissing their common law claims that alleged wrongful discharge in violation of public policy. In *Greeley v. Miami Valley Maintenance Contrs., Inc. (*1990), 49 Ohio St.3d 228, paragraphs one, two, and three of the syllabus, the Ohio Supreme Court first recognized the common law tort of wrongful discharge in violation of public policy.

{¶22} Goodyear asserted in its motion to dismiss, and the trial court agreed, that a common law *Greeley* claim is not cognizable in an age discrimination case because the statutory remedies are sufficient to address Appellants' rights. Both this Court and the Ohio Supreme Court have held that Ohio law does recognize common law *Greeley* claims based on age discrimination, however. See *Livingston v. Hillside Rehab. Hosp.* (1997), 79 Ohio St.3d 249, 249; *Ferraro v. B.F. Goodrich Co.*, 149 Ohio App.3d 301, 2002-Ohio-4398, at ¶52. Consequently, the trial court erred in dismissing Appellants' common law claims on this basis.

{¶23} Because Goodyear raised an alternate ground to dismissing some of the Appellants' common law claims, this Court will address it. "[A] reviewing

court is not authorized to reverse [a] judgment merely because erroneous reasons were assigned as the basis thereof." *Agricultural Ins. Co. v. Constantine* (1944), 144 Ohio St. 275, 284. Although the trial court's reason for dismissing the common law claims was erroneous, this Court must affirm the decision if it was legally correct on other grounds. See *Newcomb v. Dredge* (1957), 105 Ohio App. 417, 424.

{¶24} Goodyear alternatively asserted that the common law wrongful discharge claims of Jones and Polk must be dismissed because, according to the allegations of the complaint, they were still employed by Goodyear.[4] Goodyear is correct that one of the elements of a *Greeley* wrongful discharge claim is that the defendant terminated the plaintiff's employment. See *Kulch v. Structural Fibers* (1997), 78 Ohio St. 3d 134, 149, quoting *Greeley*, 49 Ohio St.3d at 233-235. Construing the facts in the complaint as true, Appellants Jones and Polk were still employed by Goodyear, so the common law wrongful discharge claims asserted in Count II of their complaint were properly dismissed. Because this ground did not justify dismissing the common law claims of Appellants McGilvrey and Tipton,

[4] Although Goodyear further asserted in its motion to dismiss that McGilvrey was also still employed by Goodyear and that Appellants had incorrectly stated in their complaint that McGilvrey had been discharged, the trial court was required to accept all factual allegations in the complaint as true on a Civ.R. 12(B)(6) motion.

however, the trial court erred in dismissing their common law wrongful discharge claims.

{¶25} The second assignment of error is sustained insofar as it relates to Appellants McGilvrey and Tipton.

III.

{¶26} The first assignment of error is sustained. The second assignment of error is overruled in part and sustained in part. The judgment of the trial court is affirmed insofar as it relates to the dismissal of the common law wrongful discharge claims of Appellants Jones and Polk. The remainder of the judgment is reversed and remanded.

Judgment affirmed in part,
reversed in part, and
the cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of

Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

Exceptions.

DONNA J. CARR
FOR THE COURT

SLABY, J.
WHITMORE, J.
CONCUR

APPEARANCES:

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