**[Cite as *Kaufman v. Youngstown Tube Co.*, 2010-Ohio-1095.]**

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

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| GERALD KAUFMAN, | ) | |
| | ) | |
| PLAINTIFF-APPELLANT, | ) | |
| | ) | |
| VS. | ) | CASE NO. 09-MA-8 |
| | ) | |
| YOUNGSTOWN TUBE CO., | ) | OPINION |
| | ) | |
| DEFENDANT-APPELLEE. | ) | |

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| CHARACTER OF PROCEEDINGS: | Civil Appeal from Court of Common Pleas of Mahoning County, Ohio<br>Case No. 08CV2210 |
| JUDGMENT: | Affirmed |
| APPEARANCES:<br>For Plaintiff-Appellee | Attorney Stephen J. Chuparkoff<br>The Cincinnati Insurance Co.<br>50 S. Main St., Suite 615<br>Akron, Ohio 44308 |
| For Defendant-Appellant | Attorney Pete C. Klimis<br>James E. Lanzo LLC<br>4126 Youngstown-Poland Rd.<br>Youngstown, Ohio 44514 |

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: March 18, 2010

**[Cite as *Kaufman v. Youngstown Tube Co.*, 2010-Ohio-1095.]**
DONOFRIO, J.

**{¶1}** Plaintiff-appellant, Gerald Kaufman, appeals from a Mahoning County Common Pleas Court judgment granting summary judgment in favor of defendant-appellee, Youngstown Tube Company, on appellant's claims for employer intentional tort and retaliatory discharge.

**{¶2}** Appellant was employed by appellee, a manufacturer of steel pipe, as an end welder and loop operator. He had worked for appellee since 2003. Appellant's work duties included changing steel coils on the production line and changing the rollers used to bend and form the steel pipe.

**{¶3}** On the morning of April 4, 2005, appellant was working his normal shift. The employees started out manufacturing four-inch pipe on the production line. Around 9:30 a.m., the production changed to three-inch pipe. This switch required shutting down the production line to perform a product change-over. The change-over process took place approximately two to three times a week.

**{¶4}** As he had done in the past, appellant first changed the steel coil to accommodate the three-inch pipe. Next, appellant began to change the rollers. He unbolted the front steel support frame, referred to as a "tree." Appellant next slid the top two rollers off of their shaft. He then attempted to slide the bottom roller off its shaft. However, the steel shaft supporting the bottom roller was fractured. Appellant was unaware of the fracture. When appellant started to slide the bottom roller off of its shaft, the whole roller and the shaft dropped straight down and landed on a metal table. The sharp edge of the roller pinched and lacerated appellant's fingers. Appellant was wearing safety gloves at the time, but they did not prevent serious injury to his fingers. Appellant was immediately taken to the hospital.

**{¶5}** Appellant underwent medical treatment and therapy for his injury. He returned to work on light duty several months later.

**{¶6}** On October 28, 2005, appellee informed appellant that it no longer had any light duty work for him to perform. Appellee asked appellant to obtain a medical release so that he could return to his regular work duties. Appellant could not get a release from his doctor to return to his normal duties because of restrictions with his

hand. Appellee subsequently terminated his employment.

**{¶7}** Appellant filed a complaint against appellee raising claims asserting (1) appellee terminated his employment in retaliation because he filed a workers' compensation claim; (2) his dismissal was in violation of public policy prohibiting the use of filing a workers' compensation claim as a basis for discharge; and (3) employer intentional tort.

**{¶8}** Appellee filed a motion for summary judgment on all claims. In support of its motion, appellee relied on appellant's deposition.

**{¶9}** The trial court granted appellee's motion and awarded it summary judgment on all claims. The court found that no genuine issues of material fact existed and appellee was entitled to judgment as a matter of law.

**{¶10}** Appellant filed a timely notice of appeal on January 12, 2009.

**{¶11}** Appellant now raises a single assignment of error that states:

**{¶12}** "THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF-APPELLANT GERALD KAUFMAN'S CLAIMS ON SUMMARY JUDGMENT."

**{¶13}** In reviewing an award of summary judgment, appellate courts apply a de novo standard of review. *Cole v. Am. Industries & Resources Corp.* (1998), 128 Ohio App.3d 546, 552. Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper. Civ.R. 56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Flemming* (1994), 68 Ohio St.3d 509, 511. A "material fact" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.* (1995), 104 Ohio App.3d 598, 603, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 247-248, 106 S.Ct. 2505.

**{¶14}** Appellant's assignment of error can be broken down into two parts: the first dealing with his employer intentional tort claim and the second dealing with his retaliatory discharge claim.

**Employer intentional tort**

**{¶15}** In *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, the Ohio Supreme Court set out the controlling common law test for employer intentional tort as follows:

**{¶16}** "[I]n order to establish 'intent' for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task. (*Van Fossen v. Babcock & Wilcox Co.* [1988], 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph five of the syllabus, modified as set forth above and explained.)" Id. at paragraph one of the syllabus.[1]

**{¶17}** Appellant asserts that he presented evidence going to all three *Fyffe* elements.

**{¶18}** As to the first element, appellant had to demonstrate that a genuine issue of material fact existed as to whether appellee possessed knowledge of a dangerous condition at its factory. In order to do so, appellant had to demonstrate that: (1) a dangerous condition existed within appellee's business operations and (2) that appellee had actual or constructive knowledge that the dangerous condition existed. *Moore v. Ohio Valley Coal Co.,* 7th Dist. No. 05-BE-3, 2007-Ohio-1123, at ¶26.

**{¶19}** In support of this element, appellant relies on his affidavit, which he submitted in response to appellee's summary judgment motion. In his affidavit,

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[1] It should be noted that the injury in this case occurred on April 4, 2005. Thus, the common law test for employer intentional tort applies here. R.C. 2745.01, which became effective on April 7, 2005, codified the common law employer intentional tort action. This court found that statute to be unconstitutional in *Kaminski v. Metal & Wire Products Company,* 7th Dist. No. 07-CO-15, 2008-Ohio-1521. However, because the cause of action in this case accrued prior to the enactment of the statute, no issue exists here regarding the statute. The common law test applies.

appellant stated that after his accident supervisors told him that similar accidents have occurred in the past. (Aff. ¶1).

**{¶20}** While the fractured shaft seems to have been a dangerous condition, there is no evidence that appellee was aware of it.

**{¶21}** Appellant stated in his affidavit that he was told by supervisors that similar accidents had occurred in the past and "if a similar incident occurred, someone would be seriously injured." (Aff. ¶¶1, 2). However, appellant offers no other statements on this point. He does not state who told him this information, when the prior accidents occurred, how the prior accidents were similar to his, or whether the prior accidents were the result of a fractured shaft. Without these types of details, it is difficult to see how the bare statement offered by appellant can create a genuine issue of material fact as to whether appellee had actual or constructive notice of a fractured shaft/dangerous condition at its plant.

**{¶22}** One of appellant's regular job duties was to change the rollers when the production changed pipe sizes. (Dep. 26-27). The rollers are changed two to three times a week. (Dep. 34). When the rollers needed changed during his shift, appellant was the one to perform this task. (Dep. 34). He had changed them approximately 20 times. (Dep. 44).

**{¶23}** In his deposition, appellant stated that the shaft that holds the roller is "totally covered" by the roller. (Dep. 46). Just prior to his accident, in looking at the roller he was about to change, appellant could not tell that the shaft holding it was fractured. (Tr. 58). In fact, he agreed that everything looked normal. (Dep. 59, 63). Appellant stated he had no information that appellee knew or could have known that the shaft was broken before he took the roller off. (Dep. 58). He stated there is no way to tell that the shaft is broken without removing the roller. (Dep. 59).

**{¶24}** Appellant has alleged no facts tending to demonstrate that appellee had actual or constructive knowledge of the fractured shaft. He admitted that everything appeared to be normal and there was no way to tell that the shaft was fractured unless the roller was removed. Even if one could argue that appellee

should have somehow inspected the shaft to check for fractures and then could have possibly noticed the fracture, this would not satisfy the first *Fyffe* element. "The fact that the employer might or should have known that if it required the employee to work under dangerous conditions the employee would certainly be injured is not enough to establish a case for intentional tort. Rather, the determination turns on whether the plaintiff alleges facts showing the employer possessed actual or constructive knowledge of the dangerous situation." *Caldwell v. Petersburg Stone Co.*, 7th Dist. No. 02-CA-8, 2003-Ohio-3275, at ¶41. In this case appellant simply has not alleged any facts showing knowledge on appellee's part.

**{¶25}** As to the second element, appellant contends that due to the type of work and heavy machinery involved, a reasonable person would be substantially certain that any dangerous condition would cause harm. Again, appellant also relies on his affidavit wherein he stated that he was told by his supervisors that "if a similar incident occurred, someone would be seriously injured." (Aff. ¶2).

**{¶26}** The *Fyffe* Court set out the requisite intent for an employer intentional tort. It held that the employer's intent must be more than negligence or recklessness. *Fyffe,* 59 Ohio St.3d at paragraph two of the syllabus. Instead, the requisite intent is present when the employer knows that injuries to employees are certain or substantially certain to occur and the employer nonetheless proceeds with the process, procedure, or condition. Id. "Mere knowledge and appreciation of a risk-something short of substantial certainty-is not intent." Id. This is a very difficult standard to meet.

**{¶27}** Certain types of facts and circumstances are particularly relevant in attempting to prove that an employer had knowledge of a high probability of harm including, prior accidents of a similar nature, inadequate training, and whether an employer has deliberately removed or deliberately failed to install safety features. *Moore*, 7th Dist. No. 05-BE-3, at ¶37.

**{¶28}** In this case, there was absolutely no evidence of inadequate training or appellee deliberately removing or failing to install safety features. And while there

appears to be some evidence of prior accidents, as discussed above, there are not enough details to determine whether these prior accidents may have given appellee knowledge of a high probability of harm.

**{¶29}** Appellant also stated in his deposition that a similar incident happened with a smaller roller, where the worker "bump[ed] it, and the whole thing fell." (Dep. 45). Appellant did not know who the worker was that this happened to and had only heard about it through word of mouth. Furthermore, he stated that this prior accident happened because the worker bumped into the shaft. In appellant's case, the accident happened because the shaft was fractured and the fracture was hidden. Thus, the prior incident did not put appellee on notice as to an issue with hidden fractures in the shafts, which was the cause of the accident in this case.

**{¶30}** Additionally, as appellee points out, appellant stated in his deposition that this was a "simple accident." (Dep. 55). Furthermore, appellant stated that his task of changing the rollers was not dangerous as long as the shaft was not broken and the person performing the task was experienced in changing them. (Dep. 73). He went on to agree that his job of changing the rollers was such that if the shaft was not broken, then there was no substantial certainty that he would get hurt. (Dep. 74). Thus, without some evidence tending to show that appellee had knowledge of the fractured shaft, there is no genuine issue of material fact surrounding whether appellee had knowledge of a substantial certainty of injury.

**{¶31}** As to the third element, appellant contends that he was required to change the rollers two to three times a week. He contends that despite its knowledge of the dangerous condition, appellee still required him to change the rollers.

**{¶32}** As discussed above, there is no genuine issue of material fact suggesting that appellee knew of the dangerous condition here. Thus, appellee could not have required appellant to change the rollers despite its knowledge of the dangerous condition.

**{¶33}** Given the above analysis appellant cannot demonstrate a genuine issue of material fact as to any of the *Fyffe* elements, let alone all three elements as

he would have to do to defeat appellee's summary judgment motion. Thus, the trial court properly awarded summary judgment in appellee's favor on appellant's employer intentional tort claim.

**Retaliatory discharge**

**{¶34}** A retaliatory discharge claim can take one of two forms – a statutory claim or a common-law claim. Appellant raised both. However, his brief only asserts that summary judgment was improper as to his statutory claim.

**{¶35}** To prove a violation of R.C. 4123.90, the employee must set forth a prima facie case of retaliatory discharge demonstrating that (1) he was injured on the job, (2) he filed a claim for workers' compensation, and (3) he was discharged by his employer in contravention of R.C. 4123.90. *Wilson v. Riverside Hosp.* (1985), 18 Ohio St.3d 8, 1, at the syllabus. Once the employee demonstrates a prima facie case, the burden shifts to the employer to set forth a legitimate, nonretaliatory reason for the discharge. *Kilbarger v. Anchor Hocking Glass Co.* (1997), 120 Ohio App.3d 332, 338. If the employer can set forth a nonretaliatory reason for the discharge, the burden then shifts back to the employee to show that the employer's reason is a pretext and that the real reason for the discharge was the employee's protected activity under the Ohio Workers' Compensation Act. Id.

**{¶36}** R.C. 4123.90 provides, in pertinent part:

**{¶37}** "No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer."

**{¶38}** In this case, there is no dispute that appellant was injured on the job and that he filed a workers' compensation claim. Appellant received benefits and his disability was determined to be permanent/partial. (Dep. 67-68).

**{¶39}** Appellant argues that appellee's stated reason for his discharge, because he could not get a medical release to return to normal work duties, was a

pretext and that the real reason for his discharge was the fact that he filed a workers' compensation claim. Appellant asserts that appellee told him he could return to work when he got a medical release but that appellee knew appellant could not obtain a release at that time. He points out that only six months had passed from the date of his injury until the time appellee told him to return to normal duty.

**{¶40}** An employer may discharge an employee who filed a workers' compensation claim as long as the discharge is for just and lawful reasons. *Goersmeyer v. General Parts*, 9th Dist. No. 06CA00045-M, 2006-Ohio-6674, at ¶8. R.C. 4123.09 only protects against termination in direct response to the pursuit of worker's compensation benefits. Id.

**{¶41}** In order to establish a prima facie case of retaliatory discharge, the plaintiff must demonstrate a "causal connection" between the filing of the workers' compensation claim and being terminated. *Gerding v. Girl Scouts of Maumee Valley Council, Inc.*, 6th Dist. No. L-07-1234, 2008-Ohio-4030, at ¶31. The causal connection requires evidence of a retaliatory state of mind of the employer. *Buehler v. AmPam Commercial Midwest*, 1st Dist. No. C-060475, 2007-Ohio-4708, at ¶24. The plaintiff is not required to produce a "smoking gun" to withstand summary judgment but may satisfy the burden of proof by circumstantial or direct proof. *Kent v. ChesterLabs, Inc.* (2001), 144 Ohio App.3d 587, 592.

**{¶42}** Certain factors that can demonstrate the existence of a causal connection are things such as (1) punitive action like bad performance reports appearing immediately after a claim is filed, (2) the time period between the filing of the claim and discharge, (3) a change in salary level, (4) recent hostile attitudes, and (5) whether legitimate reasons existed for the discharge. *Gerding*, at ¶31, citing *Huth v. Shinner's Meats, Inc.,* 6th Dist. No. L-05-1182, 2006-Ohio-860, at ¶17.

**{¶43}** Here appellant did not submit any evidence suggesting that appellee terminated him because of his workers' compensation claim. Appellant stated that after a while, he returned to work on light duty. (Dep. 77). He worked on light duty for four months. (Dep. 79). Appellant stated that appellee then asked him to obtain a

doctor's release to return to his regular work duties. (Dep. 79). He stated that he asked his doctor for a full medical release but that his doctor would not give him the release. (Dep. 80-81). Additionally, appellant stated that his disability was permanent. (Dep. 68).

**{¶44}** In the present case, the evidence shows that (1) appellant was injured at work, (2) appellant filed a workers' compensation claim and received benefits, (3) appellee was able to provide appellant with a light duty job for a few months, and (4) appellee terminated appellant six months after his injury when he was still unable to return to his regular job duty and there was no more light duty for him to perform. There is no evidence of the usual "causal connection" factors. There is no evidence of any punitive actions, negative reports or performance reviews, termination immediately after appellant filed the claim, a change in salary level, or hostile attitudes. In fact, the evidence shows that appellee found some light duty work for appellant to perform for a few months before asking him to return to his regular position. In short, there is no evidence that appellee possessed the "retaliatory" state of mind needed to establish the requisite causal connection and the resulting prima facie case.

**{¶45}** Other courts have held that when a workplace injury prevents the employee from returning to his regular job duties and there is no other work for him to do, the employer has just cause to terminate the employment. See *Goersmeyer*, supra (employee injured at work was not fired in retaliation for workers' compensation claim when her doctor stated that her medical restrictions were permanent and employer had no jobs she could perform); *Nickerson-Mills v. Family Medicine of Stark Cty.,* 5th Dist. No.2004-CA-00389, 2005-Ohio-3547 (former employer did not violate R.C. 4123.09 where former employee, who was terminated more than two-and-a-half months after filing her claim, was unable to carry out job requirements); and *King v. E.A. Berg & Sons, Inc.,* 11th Dist. No.2002-T-0182, 2003-Ohio-6700 (employee was not terminated on retaliatory basis where employer had no other position for employee who suffered neck injury and was unable to perform job duties).

**{¶46}** There is no evidence creating a genuine issue of fact as to why appellee terminated appellant. The evidence is uncontroverted that appellee discharged appellant because he could not return to his regular job duties. In fact, appellee allowed appellant to return to work for several months on light duty before it requested that he return to his normal work duties. Therefore, the trial court properly granted summary judgment in appellee's favor on appellant's retaliatory discharge claim.

**{¶47}** Accordingly, appellant's sole assignment of error is without merit.

**{¶48}** For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.