[Cite as *Bacoccini v. Ice Industries, Inc.*, 2009-Ohio-3800.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Karleen Bacoccini	Court of Appeals No. L-08-1401
Appellant	Trial Court No. CI 08-3203
v.	
Ice Industries, Inc., et al.	**DECISION AND JUDGMENT**
Appellees	Decided: July 31, 2009

* * * * *

Thomas A. Sobecki, Richard M. Kerger and Jessica R. Kerger, for appellant.

Renisa A. Dorner, for appellees.

* * * * *

SINGER, J.

{¶ 1} Appellant, Karleen Bacoccini, appeals a summary judgment from the Lucas County Court of Common Pleas favoring appellee, Ice Industries, Inc. For the following reasons, we reverse.

{¶ 2} Appellant began working for Ice Industries, Inc. ("Ice One"), in July 1999. Appellant was hired as Quality Director of Ice One, and subsequently became a minority

shareholder, along with four others. Howard Ice was the majority shareholder and president of Ice One at the time appellant was hired. Under the terms of the shareholder agreement, appellant was an employee of Ice One.

{¶ 3} On January 29, 2002, appellant signed a stock purchase and redemption agreement, selling her stocks back to Ice One. On or shortly after January 29, 2002, appellant received a letter from Howard Ice, dated January 29, 2002, regarding continued employment with Ice One.

{¶ 4} On January 16, 2002, Ice Holdings, Inc., was created. On February 19, 2002, Ice One's articles of incorporation were amended, changing the name of the corporation to Acklin Stamping Company ("Acklin"). On February 19, 2002, Ice Holdings' articles of incorporation were amended, changing the name of the corporation to Ice Industries, Inc ("Ice Industries"). Subsequently, Acklin became the wholly owned subsidiary of Ice Industries. At the time of appellant's termination, Ice Industries was the parent company of three wholly owned subsidiaries; Acklin, Deerfield Manufacturing, and Grenada Stamping & Assembly.

{¶ 5} Howard Ice and Paul Bishop served as CEO and president respectfully, of both Acklin and Ice Industries. Acklin had no board of directors. The highest ranking position at Acklin, that was not occupied by an individual who also served as an officer for Ice Industries, was the plant superintendent, Vince Curtis. Appellant held the second highest position at Acklin.

{¶ 6} Sometime between February 2002 and July 2006, a decision was made to restructure Acklin and eliminate the position held by appellant. According to the affidavit of Mark Echler, Human Resources Director of Ice Industries, the restructuring only took place at Acklin.

{¶ 7} Several days before appellant's termination, she received an employee handbook. On July 21, 2006, appellant received notice of her termination from Human Resources assistant, Cheryl Lyons, an employee of Acklin.

{¶ 8} On April 7, 2008, appellant initiated the present case, naming appellee, Ice Industries, as one of the defendants. Appellant alleged sex discrimination pursuant to R.C. 4112.99 and intentional/reckless infliction of emotional distress. In response, appellee filed a motion for summary judgment. Appellee contended that it, as the parent company of Acklin, could not be liable if appellant was in fact terminated because of her gender. The lower court granted summary judgment.

{¶ 9} Appellant now appeals setting forth the following three assignments of error:

{¶ 10} "I. The trial court erred in granting Summary Judgment and determining that no genuine issue of material fact exists as to whether Appellee Ice Industries, Inc. was Appellant's employer for purposes of Appellant's unlawful discrimination in employment claims brought pursuant to Chapter 4112.

{¶ 11} "II. The trial court erred in selecting the common law test for piercing the corporate veil as announced by the Ohio Supreme Court in *Dombroski v. WellPoint, Inc.*,

Slip Opinion No. 2008 Ohio 4827, as the appropriate test to determine when a parent corporation will be considered an employer along with its wholly owned subsidiary in an action for unlawful discrimination in employment claims brought pursuant to Chapter 4112.

{¶ 12} "III. The trial court erred by failing to view the evidence in a light most favorable to the non-moving party, by improperly weighing evidence, and engaging in fact-finding which should not be done on motions for summary judgment."

{¶ 13} We will consider the first and third assignments of error together.

{¶ 14} This court reviews the lower court's grant of summary judgment de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Therefore, in reviewing the grant or denial of a motion for summary judgment, an appellate court applies the same test, set forth in Civ.R. 56(C), as a trial court. Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that no genuine issue as to any material fact remains to be litigated; the moving party is entitled to judgment as a matter of law; 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 for summary judgment is made, that conclusion is adverse to that party. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 339-340. An important aspect of this test is the inability of the reviewing court to weigh the evidence or to judge the credibility of witnesses.

{¶ 15} A party seeking summary judgment bears the initial burden of identifying those portions of the record that demonstrate an absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claim. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 288. If the moving party meets their burden then the burden shifts to the nonmoving party. Id. The nonmoving party must set forth specific facts showing that there is a genuine issue for trial, and if the nonmoving party fails, then summary judgment is appropriate. Id. at 293.

{¶ 16} While an appellate court's review of summary judgment is termed "de novo" review, it is not a true de novo review. The reviewing court is limited to the evidence considered by the trial court. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 360 (an appellate court cannot usurp the trial court's role by making "independent" factual determinations and conclusions of law-it must review the trial court's judgment). Rather, when a trial court fails to consider all of the evidence properly submitted regarding a summary judgment motion, the appellate court is required to find reversible error. Id.

{¶ 17} R.C. 4112.02 provides in relevant part:

{¶ 18} "It shall be an unlawful discriminatory practice:

{¶ 19} "(A) For any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to

hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment."

{¶ 20} After careful review of the record, we conclude there are genuine issues of material fact, as to whether appellee was so involved with the matters of Acklin, that Acklin was merely appellee's alter-ego.

{¶ 21} The record indicates that Acklin is incorporated with the State of Ohio and is a wholly owned subsidiary of appellee. The record also reveals that appellee has never directly employed appellant. Nevertheless, appellant contends that appellee dominated and controlled Acklin in such a manner that requires piercing the corporate veil.

{¶ 22} Appellant contends that several factors raise genuine issues of material fact regarding appellee's liability. In particular, appellant enumerates the following: (1) appellee had common officers with Acklin; (2) the common officers made the decision to terminate appellant; (3) appellee created the employee handbook and distributed the handbook to all subsidiaries; (4) appellee was listed as appellant's employer in unemployment documents; (5) several operating functions of Acklin were the sole result of directives from appellee; (6) appellee dictated the sales function for Acklin; (7) appellee made decisions as to where and on what projects Acklin's employees worked; (8) appellee provided a group life insurance plan to appellant; (9) appellee's corporate name appeared as the employer on appellant's W-2 through her termination.

{¶ 23} Ohio law permits one corporation to own all of the stock of another corporation and employ common officers and directors, as well as other personnel,

without risking shareholder liability. *Clinical Components, Inc. v. Leffler Indus., Inc.* (Jan 22, 1997) 9th Dist No. 95CA0085. The fact that appellee has common officers with Acklin and its other subsidiaries, does not alone justify piercing the corporate veil. Yet, just because a business practice may be common, that should not automatically result in a conclusion that the practice can never support a claim of a parent corporation treating a subsidiary as its alter-ego. The court must focus on why certain practices and actions are being done, and their effect on the parent and subsidiary's relationship.

{¶ 24} In the present case, there is an issue as to which company's 'hat' the officers were wearing when they made the decision to terminate appellant's employment. It is undisputed that Howard Ice made the final decision as to appellant's termination and that decision was implemented by Paul Bishop and Mark Echler. However, the trial court concluded that since Howard Ice is the CEO of Acklin, he must have made the decision wearing Acklin's 'hat'. We see no evidence in the record to support this conclusion.

{¶ 25} Appellant contends that the employee handbook is evidence of appellee's control over Acklin. In *Starner v. Guardian Indus.* (2001), 143 Ohio App.3d 461, the court concluded that the parent company's provision of employment policies did not risk shareholder liability. Id. at 469.

{¶ 26} We conclude that the employee handbook creates a genuine issue of material fact. An employee handbook often sets out guidelines for employees and how they are to accomplish their day-to-day work. Thus, if the parent company creates an employee handbook, and distributes that handbook to employees of the subsidiary, the

parent company may also be found to control employment related issues of the subsidiary. Determining what impact the employee handbook has in terms of the parent company's control of the subsidiary is an exercise best suited for a factfinder.

{¶ 27} Appellee contends that it was cost effective to have it create the employee handbook, rather than let the individual subsidiaries create employee handbooks. Appellee also highlights the fact that every page displays Acklin's logo with the words "Subsidiary of Ice Industries" underneath. Upon review of the record, we note that appellee's name appears in the handbook's sections setting forth the employee guidelines. At one point the employee handbook reads, "In addition, I understand that this Handbook states ICE INDUSTRIES policies and practices in effect on the date of publication." These competing pieces of evidence converge on an issue of material fact, which must be resolved by a factfinder.

{¶ 28} Beyond theses facts are several other facts which present issues of material fact. For example, the unemployment documents list appellee as appellant's employer. The same documents show that appellant lost employment with both Acklin and appellee.

{¶ 29} The trial court also failed to consider claims specifically stated in appellant's affidavit, and not rebutted by appellee. In her affidavit appellant states that appellee dictated the sales function at Acklin, implementing new customer programs. Appellant also states that operating functions at Acklin, such as product and process engineering and quoting and design, were solely the result of directives from appellee. These claims cannot be ignored. If these claims are found to be true, they could

ultimately demonstrate the extent of appellee's control over Acklin, and, therefore we conclude that the evidence in the record, when viewed in a light most favorable to appellant, presents genuine issues of material fact. Appellant's first and third assignments of error are well-taken. Given our disposition of appellant's first and third assignments of error, we need not address appellant's second assignment of error.

{¶ 30} The judgment of the Lucas County Court of Common Pleas is reversed and this case is remanded for proceedings consistent with this decision. Appellees are ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE