[Cite as *Frankel v. Toledo Pub. Schools*, 2015-Ohio-1571.]

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

Sharon Frankel	Court of Appeals No. L-14-1027
Appellant	Trial Court No. CI0201301019
v.	
Toledo Public Schools, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: April 24, 2015

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Joseph P. Jordan, for appellant.

John A. Borell, Jr., for appellees.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that granted summary judgment in favor of appellees, Toledo Public Schools, et al. The trial court also denied appellant Sharon Frankel's motion for summary judgment, denied her motion for leave to file a second amended complaint, and dismissed her first

amended complaint with prejudice. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} The undisputed facts relevant to the issues raised on appeal are as follows. Appellant Sharon Frankel worked for appellee Toledo Public Schools ("TPS") for 31 years prior to retiring in 1997. At the beginning of the 2008-2009 school year, Don Haddox, then director of professional personnel for TPS, asked Frankel to return to TPS as a library/media specialist assigned to several elementary schools.[1] Frankel agreed and entered into a one-year teacher's limited contract with TPS for the 2008-2009 school year. Frankel and TPS subsequently entered into a second one-year contract for the 2009-2010 school year. Then, in a May 10, 2010 letter, Haddox notified Frankel that TPS was not going to renew her contract for the upcoming school year.

{¶ 3} As a member of the Toledo Federation of Teachers ("TFT"), Frankel's employment was subject to the collective bargaining agreement ("CBA") between TPS and the union. The CBA sets forth a grievance procedure under which TFT or a member may bring a complaint for alleged violations, misinterpretations or misapplications of the provisions of the CBA.

{¶ 4} After Frankel received the letter from Haddox, she sought the assistance of the TFT. On May 14, 2010, Cliff Mallett, a TFT officer, filed an "Informal Grievance" on behalf of Frankel, asserting that Frankel's rights under the CBA had been violated and that she was entitled to have her teaching contract renewed for a period of three more

[1] Hereafter, "TPS" refers to appellees Toledo Public Schools and Haddox.

years. The record reflects that the grievance was copied to Frankel and the president of the TFT. On May 16, 2010, Mallett filed a "Formal Grievance" on behalf of Frankel, stating that the two one-year contracts offered to her were inconsistent with the contract agreement and that Haddox's claim that Frankel had received a poor evaluation was inconsistent with prior satisfactory evaluations.

{¶ 5} On May 19, 2010, Judy Hull, a TFT official, wrote to the TPS director of labor relations, Annmarie Heldt, asking that Frankel's grievance be scheduled for a Level II grievance hearing. TPS scheduled a hearing for June 8, 2010, but the hearing was canceled. A notation on an internal TPS memo indicates that the cancellation was due to Frankel's being in Europe; Frankel states that the cancellation was simply due to "scheduling difficulties." The parties disagree as to whether Frankel was ever instructed to contact TPS to reschedule the grievance hearing. Nevertheless, the hearing was not rescheduled. On August 24, 2010, however, Cliff Mallett corresponded with Annmarie Heldt and Diane Irving, then acting executive assistant to the TPS superintendent for human resources, concerning the grievance. In his letter, Mallett stated he would suggest to TFT vice president Kevin Dalton that the Federation proceed to arbitration, noting that the final decision would be up to Dalton and the grievance committee.

{¶ 6} On August 31, 2010, Frankel filed a complaint with the Ohio Civil Rights Commission ("OCRC") alleging age discrimination. Frankel withdrew that charge on December 13, 2010.

{¶ 7} Following the June 2010 cancellation of the grievance hearing, Frankel's TFT representatives attempted to either move the grievance along or resolve it. On February 8, 2011, Heldt updated Dalton by memo, stating that they had heard nothing from Frankel until November 2010 after she filed the age discrimination charges with the OCRC. Heldt stated they had met with the OCRC in an attempt to mediate and that Frankel preferred to go to EEOC and federal court. On February 14, 2011, Beth Harrison, a TFT official, wrote to Heldt asking that the Frankel grievance be scheduled for a hearing as soon as possible.

{¶ 8} Harrison provided TPS with copies of documents in which Frankel stated her demands for settling her grievance. In an undated letter to Harrison, Frankel stated,

> I know that the position I had will no longer be available to me, however I have a Florida teaching license and letters of recommendation and a good file with TPS is important * * * I would be satisfied with the following:
>
> * 2 letters of recommendation
>
> * Removal of termination letter in my file
>
> * COBRA payment returned to me.

{¶ 9} On February 23, 2011, Heldt replied to Harrison's letter, stating that Frankel had delayed too long and that Heldt would not schedule the grievance for hearing, viewing it as not arbitral. According to the affidavit of Cheryl Spieldenner, chief human resources director for TPS, Spieldenner and Judy Hull, vice president/grievance chair for

the union, met several times in 2011 in an attempt to resolve the grievance. Spieldenner's understanding was that Frankel would resolve her grievance if TPS complied with her demands regarding the letters of recommendation, removal of the termination letter from her file and the $1,228.17 COBRA reimbursement. Spieldenner agreed to those terms of settlement and on November 2, 2011, Hull wrote to her asking her to follow through with the settlement. On November 15, 2011, Spieldenner wrote to Hull, with a copy to Frankel, informing her that a check in the amount of $1,228.17 had been mailed to Frankel and that "this payment resolves the outstanding grievances for Ms. Frankel."

{¶ 10} TPS removed the May 10, 2010 Haddox letter from Frankel's personnel file in accordance with the settlement agreement. Frankel cashed the check. In her deposition taken June 12, 2013, Frankel admitted that she received the letter and the check and that she read the language about the resolution of her grievance. Spieldenner stated in her affidavit that neither Frankel nor any representative of the TFT contacted her challenging the statement in the transmittal letter that the grievance had been fully resolved. In her deposition, Frankel initially agreed that she never questioned anyone about Spieldenner's statement that the payment resolved all of her outstanding grievances; she later claimed at deposition that she was wrong in stating she had settled her grievance.

{¶ 11} On January 2, 2013, Frankel filed a three-count complaint against TPS and its former employee Donald Haddox, seeking damages for the board of education's

alleged wrongful termination of Frankel's employment contract. In her complaint, Frankel alleged her termination was illegal because it was motivated by her age, because the stated reason for termination was actually false, and because the manner in which she was terminated constituted a violation of R.C. 3319.11. On August 14, 2013, Frankel was granted leave to file an amended complaint.

{¶ 12} On November 18, 2013, TPS moved for summary judgment. On November 25, 2013, Frankel moved for summary judgment and sought leave to file a second amended complaint.

{¶ 13} In its order filed January 17, 2014, the trial court granted the TPS motion for summary judgment and denied Frankel's motion for summary judgment along with her motion for leave to file a second amended complaint. The trial court also dismissed appellant's first amended complaint with prejudice.

{¶ 14} Frankel sets forth the following assignments of error:

> 1. The Common Pleas Court erred as a matter of law in granting Defendant's Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment for the reason that plaintiff possessed a statutorily created property right in continuing public employment as a teacher under her limited contract with the Toledo Board of Education which was terminated without any procedural requirements as provided in R.C. Chapter 39 [sic], the Collective Bargaining Agreement (CBA) or as applied.

2. The Common Pleas Court erred as a matter of law in failing to find that plaintiff's First Amended Complaint pleaded sufficient facts to permit plaintiff to prove that she was denied due process in her termination.

3. The Common Pleas Court abused its discretion in failing to grant plaintiff's Motion to File a Second Amended Complaint and plaintiff was thereby denied her day in court for the reason that defendants were on notice of the claim of the deprivation of due process and there was no prejudice to them, and no unreasonable delay or other burden to the court.

{¶ 15} We will first consider Frankel's third assignment of error in which she asserts that the trial court should have allowed her motion to file a second amended complaint. Interestingly, in her motion, Frankel stated that the proposed amendment "does not cover any new ground," and that an amendment actually "may be unnecessary." Frankel's motion represented that she simply wanted to clarify that she was making claims to enforce her statutorily created property rights and due process protections as contemplated by R.C. Chapter 3319.

{¶ 16} Civ.R. 15(A) provides that a party may seek leave of court to amend a pleading and that such leave generally should be freely given. Once an answer to a complaint is served, "a party may amend his pleading only by leave of court or by written consent of the adverse party." *Cline v. Am. Aggregates Corp.*, 15 Ohio St.3d 384, 474 N.E.2d 324 (1984), syllabus. However, given that a determination on whether to grant or deny a motion to amend lies well within the trial court's discretion, appellate court

review is conducted pursuant to an abuse of discretion standard. *Turner v. Cent. Local School Dist.*, 85 Ohio St.3d 95, 99, 706 N.E.2d 1261 (1999). An abuse of discretion implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Factors for the trial court to consider include whether the movant makes a prima facie showing of support for the new matters sought to be pleaded, the timeliness of the motion, and whether the proposed amendment would prejudice the opposing party. *Wilmington Steel Prods., Inc. v. Cleveland Elec. Illuminatin*g, 60 Ohio St.3d 120, 573 N.E.2d 622 (1991). "Where a plaintiff fails to make a prima facie showing of support for new matters sought to be pleaded, a trial court acts within its discretion to deny a motion to amend the pleading." *Id.* at syllabus.

{¶ 17} The record reflects that Frankel filed her first amended complaint with leave on August 14, 2013. TPS filed a timely answer and then filed for summary judgment on November 18, 2013. Frankel filed her motion for leave to amend again on November 25, 2013, three months after her first amended complaint. She filed her own motion for summary judgment on that same date.

{¶ 18} Ohio courts have noted that "[a]n attempt to amend a complaint following the filing of a motion for summary judgment has been found to raise the spectre of prejudice." *Pintagro v. Sagamore Hills Twp.*, 9th Dist. Summit No. 25697, 2012-Ohio-2284, ¶ 22, citing *Cunningham v. Cunningham*, 9th Dist. Lorain No. 10CA007938, 2002-Ohio-2647, ¶ 18. *Pintagro* further stated that "a plaintiff should not be allowed to sit by

and then 'bolster up their pleadings in answer to a motion for summary judgment.'" *Pintagro* at ¶ 22, quoting *Johnson v. Norman Malone & Assoc., Inc*., 9th Dist. Summit No. 14142, 1989 WL 154763, *5 (Dec. 20, 1989).

{¶ 19} Here, Frankel's motion for leave to file a second amended complaint was filed three months after her first amended complaint and one week after TPS filed its motion for summary judgment. Trial had been set for February 24, 2014. Frankel's motion for leave to file the second amended complaint was untimely and prejudicial to TPS, which had already filed a motion for summary judgment.

{¶ 20} As to the substance of Frankel's proposed amendment, she asserts that the allegation of a due process violation is a "clarification" of the claim in her first amended complaint and not a new claim. A review of her first amended complaint, however, shows several counts, none of which raise a due process claim. If, in fact, Frankel's due process argument was merely a "clarification," she could have simply amended the language in one of the existing causes of action rather than propose an additional and separately-numbered cause of action. That choice suggests that the amendment is a new theory of recovery. It also appears that Frankel only pursued the due process claim after TPS filed its motion for summary judgment on Frankel's first amended complaint.

{¶ 21} Finally, the trial court found that Frankel's due process claim was not properly before that court. The record reflects that Frankel's statutory rights and remedies relative to the evaluation procedure are superseded by the Collective Bargaining

Agreement ("CBA") that governed the terms of her employment.[2] The CBA states, in relevant part:

> The procedures for the evaluation of teachers employed under limited contracts, the employment and re-employment of such teachers, and the nonrenewal of limited contracts, as set forth in the current [CBA], and by the intern-intervention program, and established practices thereunder, shall supersede the provisions of the Ohio Revised Code Sections 3319.11 and 3319.111, as revised by 1988 Ohio House Bill 330, in their entirety.

{¶ 22} Because the CBA explicitly supersedes those sanctions in their entirety, Frankel did not have the right to appeal the TPS non-renewal decision to the court of common pleas. Frankel's claim that she was not afforded the due process guarantee of the CBA is simply not properly before the trial court. Frankel's right to bring a grievance alleging a violation of the provisions of the CBA policies is set forth explicitly in the CBA. Further, despite Frankel's claim that "there was no grievance process," the record reflects that she availed herself of the appropriate grievance process very soon after receiving notification that her contract would not be renewed. Frankel had contact with various union representatives who requested a hearing for the grievance, although the hearing never occurred because she was out of the country on the June 8, 2010 scheduled date. The record also contains correspondence from Frankel's union representative in

[2] The entire CBA was made a part of the record in this case by means of the affidavit of Cheryl Spieldenner offered in support of appellees' motion for summary judgment.

February 2011 again requesting a grievance hearing be scheduled. TPS responded that a hearing would not be scheduled because Frankel had not contacted them in 2010 in order to reschedule. Additional correspondence in the record reflects settlement communications between the parties, including the letter from the TPS chief human resource officer to appellant's union representative, dated November 15, 2010, confirming that a check had been mailed to Frankel "in resolution to [her] outstanding grievance."

{¶ 23} Frankel essentially has presented complaints arising from her grievance experience, claiming that her grievance was not thoroughly investigated. Those claims are belied by the trial court record. Further, they were not properly before the lower court for the reasons set forth above. Based on the complaints Frankel articulated, her proper remedy was to file a charge with State Employment Relations Board ("SERB"). Accordingly, the trial court did not abuse its discretion by denying Frankel's motion for leave to file a second amended complaint. Frankel's third assignment of error is not well-taken.

{¶ 24} Frankel's first and second assignments of error will be discussed together. In support of her first assignment of error, Frankel asserts that the trial court erred by denying her motion for summary judgment and granting TPS's motion for summary judgment. Frankel asserts that TPS failed to comply with R.C. 3319 and her collective bargaining agreement for re-employment or non-renewal of her contract. Frankel argues that she was deprived of her statutorily created property right to public employment

without any measure of due process. She was not afforded the termination procedures provided by the CBA, she asserts, which would have given her the option of electing to proceed under R.C. 3319. Frankel states she is seeking a review by this court to determine whether the applicable evaluation procedures were used prior to the decision not to renew her contract. She asserts that her rights do not rest solely on the CBA, but are provided for as well by the enactment of R.C. 3319.11 and 3319.111.

{¶ 25} In her second assignment of error, Frankel asserts that the trial court erred in dismissing her first amended complaint.

{¶ 26} Appellate review of a trial court's summary judgment determination is conducted pursuant to a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment will be granted only when there remains no genuine issue of material fact 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. Civ.R. 56(C).

{¶ 27} Frankel's motion for summary judgment was properly denied for the reasons discussed above with regard to her motion for leave to file a second amended complaint.

{¶ 28} As to the TPS motion for summary judgment, we have already found that the terms of the CBA governing Frankel's employment explicitly supersede R.C. 3319.11 and 3319.111. Frankel had not stated a claim thereunder and cannot avail herself of the appeal provided by statute in order to vest the trial court with jurisdiction over such

claims. Again, the trial court lacks jurisdiction over Frankel's claims regarding the alleged breach of the terms of the CBA, for a complaint based on conduct which arguably constitutes an unfair labor practice is subject to the exclusive jurisdiction of the SERB, as discussed above.

{¶ 29} For all of the foregoing reasons, we find that the trial court did not err by granting the TPS motion for summary judgment, dismissing Frankel's first amended complaint and denying Frankel's motion for summary judgment. Accordingly, Frankel's first and second assignments of error are not well-taken.

{¶ 30} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

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

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE