

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

PAMELA NINGARD

Appellant

v.

SHIN ETSU SILICONES, et al.

Appellees

C.A. No. 24524

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2006-11-7039

DECISION AND JOURNAL ENTRY

Dated: June 30, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Pamela Ningard, appeals from the decision of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} Starting in 1999, Appellant, Pamela Ningard, was employed at Appellee, Shin-Etsu Silicones of America, Inc. Shin-Etsu is a manufacturer of silicone adhesives for cars and silicone rubber compounds. In July of 2004, Ningard took extended leave pursuant to the Family Medical Leave Act. In September of 2004, Ningard returned to work. In October of 2004, Ningard missed a day of work. Shin-Etsu determined that she did not have any remaining paid-time off and therefore disciplined her by instituting a “Last Chance Agreement.”

{¶3} In December of 2004, Shin-Etsu employees were conducting on site inventory at AmWare’s warehouse, a Shin-Etsu customer. Ningard was assigned to work with an AmWare employee. The AmWare employee later informed his supervisor that Ningard had told him that

Shin-Etsu had given a bonus to AmWare to distribute among its employees. The supervisor informed the employee that this information was false and reported the incident to Shin-Etsu. In response, Shin-Etsu terminated Ningard.

{¶4} On July 8, 2008, Ningard filed her amended complaint against Appellees, Shin-Etsu, Shincor Silicones, and Brian Connolly, Ningard's supervisor (collectively referred to as Shin-Etsu), asserting FMLA violations, retaliation and negligent supervision/retention. On August 21, 2008, Shin-Etsu filed its motion for summary judgment. Ningard responded to this motion. On October 17, 2008, the trial court granted Shin-Etsu's motion in part and denied it in part. Also on October 17, 2008, Ningard filed a motion to continue the trial. According to the trial court's November 3, 2008 judgment entry, on October 20, 2008, Ningard, in an attempt to finalize the trial court's grant of summary judgment, dismissed the claims upon which the summary judgment was denied. In this same judgment entry, the trial court noted that because this entire case had previously been dismissed, it dismissed the claims with prejudice. On November 14, 2008, the trial court, incorporating its October 17, 2008 summary judgment decision, denied Ningard's October 17, 2008 motion to continue, granted the motion for summary judgment regarding Ningard's retaliation claim under FMLA, her claim for retaliation pursuant to state law and her claim for negligent retention/supervision. The trial court stated that it was ready to proceed on the remaining claims, i.e., "Failure to reinstate Plaintiff to the same or equivalent position after her July 2004 FMLA leave as well as requiring her to take paid leave instead of unpaid leave without proper notification. However, Plaintiff's counsel orally dismissed these claims and the trial did not go forward." The trial court then stated that the order was a final, appealable order pursuant to Civ.R. 54 and Civ.R 58 and that there was no just cause

for delay. Ningard timely appealed this decision and has raised four assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

“THE IMPROPER ASSESSMENT OF PAID LEAVE FOR FMLA LEAVE WITHOUT PROPER NOTICE IS A VIABLE PRESCRIPTIVE VIOLATION AND SHOULD PROCEED TO TRIAL[.]”

{¶5} In her first assignment of error, Ningard contends that the improper assessment of paid leave for FMLA leave without proper notice is a viable prescriptive violation and should proceed to trial. We do not agree.

{¶6} At the outset, we must determine if this issue is properly before us. In its final entry, dated November 14, 2008, the trial court noted that it previously denied Shin-Etsu’s motion for summary judgment in part and granted it in part. It specifically noted that it granted the motion with regard to Ningard’s retaliation claim under FMLA; her claim for retaliation under state law; and her claim for negligent retention/supervision. The trial court denied Shin-Etsu’s summary judgment motion with regard to Ningard’s remaining claims. In its entry, the trial court stated that

“[h]aving denied the continuance, the court was prepared to proceed on the remaining claims of Plaintiff, under Count 1 (FMLA violations), to wit; Failure to reinstate Plaintiff to the same or equivalent position after her July 2004 FMLA leave as well as requiring her to take paid leave instead of unpaid leave without proper notification. However, Plaintiff’s counsel orally dismissed these claims and the trial did not go forward.

“***

“[P]redicated upon the court’s ruling on Summary Judgment, the denial of the continuance and Plaintiff’s counsel’s declaration, the Amended Complaint of Plaintiff and all of the stated claims therein be and are hereby dismissed with prejudice. This order resolves all claims between these parties and is a final appealable order pursuant to Ohio Rules of Civil Procedure 54 and 58. There is

no just cause for delay and this order therefore takes immediate effect upon docketing.”

{¶7} Civ.R. 41(A)(1)(a) states that “a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by *** filing a notice of dismissal at any time before the commencement of trial[.]” The Ohio Supreme Court has recently reiterated that Civ.R. 41 does not allow for the dismissal of fewer than all of the claims against a certain defendant. *Pattison v. W.W. Grainger, Inc.*, 120 Ohio St.3d 142, 2008-Ohio-5276, at ¶20. Accordingly, Ningard’s attempt to dismiss the remaining claims was improper, and thus, those claims are still pending before the trial court.

{¶8} Further, the Ohio Supreme Court held that “when a plaintiff has asserted multiple claims against one defendant, and some of those claims have been ruled upon *but not converted into a final order through Civ.R. 54(B)*, the plaintiff may not create a final order by voluntarily dismissing pursuant to Civ.R. 41(A) the remaining claims against the same defendant.” (Emphasis added.) *Id.*, at ¶1.

{¶9} Civ.R. 54(B) allows the trial court to “enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay.” In the instant case, the trial court used the Civ.R. 54(B) language. Despite Ningard’s failed attempt to dismiss the remaining portion of her claims, we conclude that the trial court has properly converted the judgment into a final order. *Id.* However, we have consistently held that an order *denying* summary judgment is generally not a final, appealable order. *Haley v. Reisinger*, 9th Dist. No. 24376, 2009-Ohio-447, at ¶14. Accordingly, Ningard could appeal to this Court regarding the claims upon which the trial court entered final judgment, i.e., the partial *grant* of Shin-Etsu’s summary judgment.

{¶10} As the trial court denied Shin-Etsu’s summary judgment motion with regard to Ningard’s claim that Shin-Etsu required her to take paid leave instead of unpaid leave without proper notification, we conclude that any error with respect to this claim is not properly before us. Accordingly, Ningard’s first assignment of error is overruled.

ASSIGNMENT OF ERROR II

“A SUFFICIENT EVIDENTIARY RECORD ESTABLISHING A CAUSAL CONNECTION EXISTED FOR THE FMLA RETALIATION CLAIM AND SUMMARY JUDGMENT WAS IMPROVIDENTLY GRANTED.”

{¶11} In her second assignment of error, Ningard contends that a sufficient evidentiary record existed to establish a causal connection for the FMLA retaliation claim and therefore summary judgment was improvidently granted. We do not agree.

{¶12} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶13} Pursuant to Civil Rule 56(C), summary judgment is proper if:

“(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 party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶14} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the

record of the type listed in Civ.R. 56(C). *Id.* Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. *Id.* at 293. The non-moving party “may not rest upon the mere allegations and denials in the pleadings” but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶15} In the instant case, Ningard contends that she was terminated for exercising her right to take FMLA leave. Shin-Etsu contends that it terminated Ningard for violation of a “Last Chance Agreement.” It has been explained that:

“The FMLA provides eligible employees up to 12 work-weeks of unpaid leave in any 12-month period ‘for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition.’ Sections 2601(b)(2) and 2612, Title 29, U.S.Code. The FMLA prohibits employers from discriminating against employees for exercising their rights under the Act. Section 2615(a)(2). Basing an adverse employment action on an employee’s use of leave or retaliation for exercise of FMLA rights is therefore actionable. *Skrjanc v. Great Lakes Power Serv. Co.* (C.A.6, 2001), 272 F.3d 309. An employee can prove FMLA retaliation circumstantially, using the method of proof established in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792 []. To establish a prima facie case of retaliation circumstantially, plaintiff must show that she exercised rights afforded by the FMLA, that she suffered an adverse employment action, and that there was a causal connection between her exercise of rights and the adverse employment action. *Robinson v. Franklin Cty. Bd. of Commrs.* (Jan. 28, 2002), S.D.Ohio No. 99-CV-162, 2002 WL 193576; *Soletro v. Natl. Fedn. of Indep. Business* (N.D.Ohio 2001), 130 F.Supp.2d 906; *Darby v. Bratch* (C.A.8, 2002), 287 F.3d 673, 679.” *Zechar v. Ohio Dept. of Edn.*, 121 Ohio Misc.2d 52, 2002-Ohio-6873, at ¶9.

{¶16} In her response to Shin-Etsu’s summary judgment motion, Ningard contended that

“the evidence is uncontroverted that [Shin-Etsu] was qualified; [she] availed herself of a right or benefit afforded by the FMLA and sustained an adverse action i.e. being fired. Defendants do not and cannot dispute these elements of a prima facie case. What is at controversy is the causal connection between the firing and exercise of her FMLA rights including the timing issue.”

The trial court found that Ningard failed to show that there was a causal connection between these two events, finding particularly relevant the time lapse between them. Ningard returned to work from FMLA leave on September 20, 2004 and was terminated on December 28, 2004.

{¶17} The U.S. Supreme Court has explained that to determine a “causal connection”

“[t]he court may look to the temporal proximity between the adverse action and the protected activity to determine whether there is a causal connection. See *Harrison v. Metro. Govt. of Nashville & Davidson Cty., Tenn.*, (C.A.6, 1996), 80 F.3d 1107, 1118-1119. However, other evidence is usually required, especially where the events are separated by more than a few days or weeks. *Id.* ‘The cases that accept mere temporal proximity between an employer’s knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close.’ *Clark Cty. School Dist. v. Breedon* (2001), 532 U.S. 268, 273, 121 S.Ct. 1508 []. Nevertheless, a prima facie case requires only a minimal showing before shifting the burden to the employer to explain an adverse employment action. *St. Mary’s Honor Ctr. v. Hicks* (1993), 509 U.S. 502, 506 []; *Sprenger v. Fed. Home Loan Bank* (C.A.8, 2001), 253 F.3d 1106, 1111.” *Zechar*, supra, at ¶11.

{¶18} In her response to Shin-Etsu’s summary judgment motion, Ningard stated that “there is no one factor dispositive in establishing a causal connection. Rather it is the 23 month history of treatment against [Ningard] by these Defendants. Obviously, the fact that the adverse action was taken shortly after [Ningard’s] exercise of protected rights is relevant to causation.” Considering the three month span between the protected activity, i.e., Ningard’s return from FMLA leave and the adverse employment action, i.e., her termination, we cannot conclude that there was a causal connection based solely upon temporal proximity. *Id.* Accordingly, we must determine whether Ningard pointed to any other evidence that would establish a connection.

{¶19} As we stated above, to determine a causal connection, we look to the activity that occurred between the protected activity and the adverse employment action, not to activity that occurred prior to the exercise of the protected activity, as Ningard urged of the trial court. *Id.* Ningard argues that “a critical dimension to the case *sub judice* is only a month into [her] return

to work she had sustained significant discipline, to wit: a Last Chance Agreement.” According to Ningard, this action, along with the three-month time frame, permits an inference of retaliation.

{¶20} Even if we were to agree with Ningard’s contention that the “Last Chance Agreement” permitted an inference of retaliation, and therefore she met her burden to establish a prima facie case, we would conclude that Shin-Etsu presented a legitimate non-discriminatory reason for her termination. *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 802. As Ningard stated in her response to the summary judgment motion, Shin-Etsu “did sustain their burden of production by articulating a legitimate non-discriminatory reason, to wit: the AmWare incident was a sufficient basis by itself to warrant termination and this was the culmination of a series of disciplinary problems with [Ningard], including her being on a last chance agreement.” We agree. Shin-Etsu supported its motion for summary judgment with several depositions and affidavits that detailed the circumstances that led to Ningard’s termination. Shin-Etsu explained that in December of 2004, Ningard was assigned to perform inventory at the AmWare Corporation, a warehouse that contracts with Shin-Etsu. During this inventory, Ningard was assigned to work with Adrian Whitlock, a warehouse foreman at AmWare. Shin-Etsu attached Whitlock’s affidavit explaining that on December 10, 2004, Ningard asked Whitlock ““what I thought about the bonuses that [Shin-Etsu] gave to AmWare’s employees.”” He informed Ningard that he did not know what she was talking about and then informed his supervisor, George Reyes, of the conversation. Shin-Etsu attached Reyes’ affidavit to its motion, in which Reyes stated that Whitlock informed him that Ningard indicated that Shin-Etsu paid AmWare a large bonus to distribute to its employees. He stated that “[u]pon learning this information, I immediately contact (sic) Shin-Etsu to complain, and to inquire as to the source of this

fabrication.” He explained that “Ningard’s actions put my company in a position where it appeared as though AmWare just took the money received from Shin-Etsu and never mentioned it to our employees, which is absolutely not true.” Brian Connolly, Ningard’s supervisor stated in his affidavit that Ningard’s “conduct in making such fabricated, malicious, unsolicited comments to an employee of AmWare was enough, in and of itself, to merit immediate termination. The fact that [Ningard] was working under a last chance agreement at the time these comments were made provided an additional basis for her termination.”

{¶21} Accordingly, we conclude that Shin-Etsu has satisfied its burden to establish a legitimate, non-discriminatory basis for firing Ningard. *McDonnell Douglas Corp.*, 411 U.S. at 802.

{¶22} Finally, we conclude that Ningard failed to establish that Shin-Etsu’s legitimate non-discriminatory reason was in fact pretextual. *Id.* at 804. “A reason cannot be proved to be pretext for retaliation unless it is shown both that the reason was false, and that retaliation was the real reason.” *Black v. Holzer Clinic, Inc.* (C.A.6, 2009), 2009 WL 650402, at *11, citing *Virts v. Consol. Freightways Corp. of Delaware* (C.A.6, 2002), 285 F.3d 508, 521. In her response to Shin-Etsu’s summary judgment motion, Ningard stated that on August 14, 2008, she paid for and took a polygraph examination that indicated that she did not make the statements at AmWare. However, we cannot conclude that such a statement satisfies Ningard’s burden to show that Shin-Etsu’s decision to fire her in December of 2004 was in fact pretextual. Ningard cannot point to a polygraph examination, which occurred nearly four years *after* the adverse employment action, to show that Shin-Etsu’s response to the AmWare incident was actually a pretext for retaliation. This new information does not show that the reason given by Shin-Etsu was false, but rather that it may have acted upon inaccurate information. Further, this statement

does not show that retaliation was Shin-Etsu's real reason for terminating Ningard. Accordingly, we conclude that Ningard has failed to show that Shin-Etsu's legitimate, non-discriminatory basis for her termination was pretextual. As such, she has failed to show that a genuine issue of material fact existed and therefore, the trial court properly granted Shin-Etsu's motion with regard to retaliation. Ningard's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

“THE TRIAL [COURT] ERRED BY DISMISSING THE STATE LAW RETALIATION CLAIM SINCE THERE WAS EVIDENCE OF ILLEGAL SEX DISCRIMINATION.”

{¶23} In her third assignment of error, Ningard contends that the trial court erred by dismissing the state law retaliation claim because there was evidence of illegal sex discrimination. We do not agree.

{¶24} Ningard repeatedly contends that a cause and effect routine developed between her and Shin-Etsu engaging in “protected activity because of her sex[.]” Ningard does not point to a portion in the record wherein she presented this argument to the trial court. App.R. 12; App.R. 16. A review of the amended complaint reveals that as part of her second cause of action, Ningard argued that “[a]ll of the foregoing conduct by these Defendants, jointly and severally, were improper and illegal retaliation against Plaintiff in contravention of federal and Ohio law.” Further, in her response to Shin-Etsu's motion for summary judgment, Ningard listed her causes of action as “FMLA Violations; *retaliation under state law*; and negligent retention and supervision pertaining to Brian Connolly.” (Emphasis added.) Further, she stated that

“[a]t its inception, Defendant neatly try (sic) a diversionary tactic by citing [Ningard's] deposition testimony wherein she admits she was not discriminated against because of sex and age. Neither the initial re-filed complaint nor the recent amended complaint have any such averment.”

It appears that Ningard concedes that she has not asserted any claim below with regard to sexual discrimination. Instead, her state law claim related to retaliation based upon seeking legal counsel.

{¶25} Not only did Ningard not raise the sexual discrimination issue before the trial court, she affirmatively denied any such claim. Accordingly, we conclude that she has affirmatively waived this argument on appeal. *State v. Hairston*, 9th Dist. No. 05CA008768, 2006-Ohio-4925, at ¶9. Therefore, we are precluded from addressing it on appeal. *Id.* Ningard’s third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

“IT WAS AN ABUSE OF DISCRETION NOT TO GRANT THE MOTION FOR CONTINUANCE.”

{¶26} In her fourth assignment of error, Ningard contends that the trial court abused its discretion by not granting her motion for continuance. We do not agree.

“The Supreme Court of Ohio has held that the grant or denial of a continuance is a matter that is entrusted to the broad, sound discretion of the trial judge. *State v. Unger* (1981), 67 Ohio St.2d 65, syllabus. In making that decision, the trial court must weigh all competing considerations. *Id.* at 67-69. The trial court must balance any potential prejudice to the defendant against the court’s right to control its own docket and the public’s interest in the prompt and efficient dispatch of justice. *Id.* at 67. When reviewing a decision that has been entrusted to the discretion of the trial court an appellate court may not substitute its judgment for that of the trial court. *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107-08. *** Abuse of discretion is more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157-58.” *State v. Burson* (Apr. 19, 2000), 9th Dist. No. 99CA0017, at *4.

{¶27} Ningard contends that the trial court was “presented with a very compelling situation. [] Ningard could not participate in a jury trial proceeding for legitimate medical reasons. Denial of the continuance was therefore arbitrary and capricious.” This is the extent of Ningard’s argument. She does not substantiate these two sentences with any citations to the

record or supporting authority. App.R. 12; App.R. 16. Accordingly, we may decline to address this assignment of error.

{¶28} Even if we were to disregard Ningard's drafting flaws, we would conclude that the trial court did not abuse its discretion. On October 17, 2008, Shin-Etsu's motion for summary judgment was granted in part and denied in part. The record indicates that at this time Ningard's counsel stated that, in order to obtain a final, appealable order, he would dismiss the remaining charge rather than proceed to trial. Regardless of this intention, Ningard filed her motion to continue on October 17, 2008, three days prior to the start of the jury trial. In this motion, she stated that her doctor determined that she was required to have emergency eye surgery. She further stated that she would provide medical documentation when it became available. The trial court's November 14, 2008 final entry states that on October 20, 2008, it orally denied Ningard's motion to continue. On October 22, 2008, two days after the jury trial was scheduled to begin, and two days after the trial court orally denied the motion, Ningard filed her supplemental motion to continue, containing a note from her doctor, which stated that on October 17, 2008, Ningard had surgery on her eye to correct a detached retina and that for the next two weeks she needed to stay in a face down position to increase her success of reattachment of the retina. We note that this letter does not indicate that the surgery was an immediate necessity that had to be completed on October 17, 2008, only that she was limited in her movement *after* the surgery had already been completed.

{¶29} Regardless, Ningard's counsel had informed the trial court that he did not wish to proceed with the previously scheduled trial and that he would dismiss the only pending charge. There is no indication that Ningard's eye surgery had anything to do with her decision not to proceed with the trial. Rather, the record reveals that Ningard's counsel attempted to dismiss the

pending claim in order to obtain a final, appealable order so that he could immediately appeal the trial court's partial grant of Shin-Etsu's summary judgment motion. In light of the representations Ningard made to the trial court, we cannot conclude that the trial court's decision to deny her motion for continuance was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Accordingly, Ningard's fourth assignment of error is overruled.

III.

{¶30} Ningard's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed. This opinion is not to be read to include any discussion of the claims still pending before the trial court as discussed in our disposition of Ningard's first assignment of error.

Judgment affirmed.

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 Appellant.

CARLA MOORE
FOR THE COURT

DICKINSON, J.
WHITMORE, J.
CONCUR

APPEARANCES:

BRIAN J. WILLIAMS, Attorney at Law, for Appellant.

MARTIN T. GALVIN, Attorney at Law, for Appellees.