

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

ANGELA GOHMAN, :
 :
 Plaintiff-Appellant, : CASE NO. CA2010-07-063
 :
 - vs - : OPINION
 : 12/6/2010
 :
 ATLAS ROOFING CORPORATION, et al., :
 :
 Defendants-Appellees. :

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09CV73276

Repper, Pagan, Cook, Ltd., John H. Forg III, 1501 First Avenue, Middletown, Ohio 45044, for plaintiff-appellant

Sebaly, Shillito & Dyer, LPA, Karl R. Ulrich, Samuel E. Dowse, 1900 Kettering Tower, Dayton, Ohio 45423, for defendants-appellees, Atlas Roofing Corp and Bryan Mandzak

BRESSLER, P.J.

{¶1} Plaintiff-appellant, Angela Gohman, appeals a decision of the Warren County Court of Common Pleas, denying her motions for additional attorney fees, back-pay, and contempt. For the reasons that follow, we affirm the decision of the trial court.¹

{¶2} The relevant facts are as follows. From October 6, 2008 to December 8, 2008,

1. Pursuant to Loc.R. 6(A), we sua sponte remove this case from the accelerated calendar and place it on the regular calendar for purposes of issuing this opinion.

Gohman worked for defendant-appellee, Atlas Roofing Corporation (Atlas), as a general laborer. On December 2, 2008, Gohman injured her eye at work. On December 4, 2008, Gohman's physician removed fiberglass from her eye and cleared her for work the following day. As a result of the injury, Gohman filed a worker's compensation claim. According to the trial court, Gohman worked until December 8, 2008, when her supervisor terminated her employment. As of the date of her termination, Gohman had completed 63 of 90 probationary days, after which time she would become a union member.

{¶3} On January 13, 2009, Gohman brought suit against Atlas, alleging the company terminated her in retaliation for filing a worker's compensation claim. In its answer, Atlas responded Gohman's discharge was "due to poor work performance and that such decision was made long before the alleged eye injury[.]"

{¶4} On March 15, 2010, the trial court held Gohman's discharge was retaliatory, and awarded Gohman \$29,819.98 in damages. The trial court also held Gohman was "entitled to re-instatement of her position and an award of reasonable attorney fees. If counsel cannot reach an agreement on the award of fees, the matter shall be set down within 30 days for hearing."

{¶5} On May 24, 2010, the trial court issued a second judgment after the parties failed to agree on attorney fees. In its entry, the court clarified Gohman's damages award as "\$29,819.98 with post-judgment interest at the legal rate and costs." The court also awarded Gohman attorney fees totaling \$19,300 and ordered Atlas to reinstate Gohman to her "former position as a general laborer" by June 1, 2010.

{¶6} When Gohman was not reinstated by June 1, 2010, she moved for additional back-pay and attorney fees and to hold Atlas in contempt for failing to comply with the court's order.

{¶7} On June 29, 2010, the trial court denied Gohman's motions on the basis of res

judicata.

{¶8} Gohman now appeals, raising three assignments of error. In the interest of clarity, we will address Gohman's first and second assignments of error together.

{¶9} Assignment of Error No. 1:

{¶10} "THE TRIAL COURT ERRED IN HOLDING THAT UNDER R.C. §4123.90 GOHMAN WAS ONLY ENTITLED TO BACK WAGES THROUGH MARCH 12, 2010, THE DATE OF TRIAL, AND NOT THROUGH JUNE 1, 2010, THE DATE OF HER COURT-ORDERED REINSTATEMENT."

{¶11} Assignment of Error No. 2:

{¶12} "THE TRIAL COURT ERRED IN HOLDING THAT UNDER R.C. 4123.90 GOHMAN WAS ONLY ENTITLED TO ATTORNEY FEES FOR WORK PERFORMED THROUGH MARCH 12, 2010, THE DATE OF TRIAL, AND NOT FOR SUBSEQUENT WORK PERFORMED IN ENFORCING THE JUDGMENT OBTAINED AT THAT TRIAL."

{¶13} In her first and second assignments of error, Gohman challenges the trial court's decision denying her motion for additional back-pay and attorney fees.

Back-Pay

{¶14} Gohman first argues the trial court erred in failing to award back-pay from the date of trial until the date of her court-ordered reinstatement. Gohman argues R.C. 4123.90 does not limit the award of back-pay to the date of trial, and a reasonable interpretation of the statute permits the extended award. In support of her argument, Gohman cites R.C. 4123.95, which provides, in relevant part: "Sections 4123.01 to 4123.94, inclusive, of the Revised Code shall be liberally construed in favor of employees[.]"

{¶15} The trial court denied Gohman's motion under res judicata, based on Gohman's apparent failure to seek additional back-pay prior to the court's second judgment, dated May 24, 2010. Our review of the record does not conflict with such a conclusion.

{¶16} Under the doctrine of res judicata, "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 114 Ohio St.3d 183, 193, 2007-Ohio-3831. Further, as noted by the Ohio Supreme Court, "an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were *or might have been* litigated in a first lawsuit." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382, 1995-Ohio-331. (Emphasis sic.)

{¶17} In the case at bar, the record lacks any evidence showing Gohman raised the issue of additional back-pay in a timely manner as to permit the trial court to consider her claim prior to rendering its second judgment on May 24, 2010. Rather, it appears Gohman only sought additional back-pay in her post-judgment motion filed weeks after the trial court's second judgment entry.

{¶18} Because Gohman had ample opportunity to seek additional back-pay that accrued prior to the May 24, 2010 judgment, but failed to do so, we find no error in the trial court's finding that this claim was barred by res judicata.

{¶19} Further, we find Gohman fails to cite relevant authority to support her position that she is entitled to back-pay that accrued *after* May 24, 2010 until the date of her court-ordered reinstatement. Gohman's reliance on *Coon v. Technical Constr. Specialties, Inc.*, Summit App. No. 24542, 2010-Ohio-417 is misplaced. In *Coon*, the Ninth District Court of Appeals upheld a back-pay award on the sole basis that the employer failed to prove its affirmative defense of mitigation. In so holding, the *Coon* court made no finding regarding the duration of the trial court's back-pay award. In the case at bar, mitigation is not at issue, therefore the holding in *Coon* has no bearing on this court's decision. Thus, absent relevant authority or evidence of error, we decline to extend the amount of back-pay awarded by the

trial court.

Attorney Fees

{¶20} In her second assignment of error, Gohman argues the trial court erred in failing to award additional attorney fees for work performed after the date of trial. Gohman argues pursuant to R.C. 4123.95, the term "reasonable attorney fees" must be construed liberally in her favor, entitling her to additional attorney fees totaling \$5,592. As with Gohman's back-pay award, the trial court denied Gohman's motion for additional attorney fees under the doctrine of res judicata.

{¶21} To the extent Gohman's attorney accrued such fees in the period between the court's first and second judgment entries, we affirm the trial court's holding under res judicata. In so holding, we find the issue of attorney fees was "actually and necessarily litigated and determined" in the prior action. *May v. Hughey*, Summit App. No. 21805, 2004-Ohio-3426, ¶24, quoting *Ameigh v. Baycliffs Corp.*, 81 Ohio St.3d 247, 249-250, 1998-Ohio-467.

{¶22} The trial court's first judgment entry, dated March 15, 2010, stated the following: "The Plaintiff is entitled to re-instatement of her position and an award of reasonable attorney fees. If counsel cannot reach an agreement on the award of fees, the matter shall be set down within 30 days for hearing." As a result of the parties' inability to agree on fees, the court scheduled a non-oral hearing for April 27, 2010. Then, on May 24, 2010, the trial court awarded Gohman attorney fees totaling \$19,300.

{¶23} Upon review of the record, it appears Gohman's attorney accrued 18.3 of 23.3 additional hours prior to the court's May 24, 2010 judgment entry. However, at no point prior to May 24, 2010 did Gohman submit these hours for the court's consideration. We find the trial court's May 24, 2010 judgment was dispositive regarding all claims for attorney fees due before that date. Because Gohman failed to raise this issue within the pertinent period, we affirm the trial court's judgment regarding additional attorney fees accrued before May 24,

2010.

{¶24} Regarding Gohman's claim for attorney fees accrued *after* May 24, 2010, we review the trial court's decision under an abuse of discretion standard. *Bittner v. TriCounty Toyota, Inc.* (1991), 58 Ohio St.3d 143, 146. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶25} Gohman has highlighted no evidence in the record to contradict the trial court's findings or to support her allegation that the trial court abused its discretion in denying her request for additional attorney fees. See, e.g., *Tupler v. Tupler* (Jan. 12, 1994), Hamilton App. Nos. C-920852, C-920887, 1994 WL 6003, at *4 ("Unless the appellant can demonstrate an error in the record, its assignment of error will fail[.]"). Here, the record fails to show that the trial court did not award "reasonable attorney fees," as provided in R.C. 4123.90. See, also, Prof. Cond. Rule 1.5(a). Therefore, Gohman has not demonstrated her second assigned error.

{¶26} Accordingly, Gohman's first and second assignments of error are overruled.

{¶27} Assignment of Error No. 3:

{¶28} "THE TRIAL COURT ERRED IN HOLDING THAT UNDER R.C. 4123.90 GOHMAN WAS NOT ENTITLED TO IMMEDIATE REINSTATEMENT."

{¶29} In her third assignment of error, Gohman challenges the trial court's interpretation of "reinstatement" under R.C. 4123.90. Gohman argues R.C. 4123.90, liberally construed, entitles her to "her former position as a general laborer, but with full back-pay and all rights, including seniority rights and union protection, that might have accrued to her had she not been wrongly terminated." Because the statutory language neither confirms nor denies such an interpretation, we consider the statute ambiguous as to the meaning of "reinstatement" as a remedy afforded under R.C. 4123.90. Accordingly, we turn to other

considerations to determine the intent of the General Assembly, as permitted by R.C. 1.49.

{¶30} "R.C. 1.49(D) permits a court, faced with determining legislative intent behind an ambiguous statute, to consider '[t]he common law or former statutory provisions, including laws upon the same or similar subjects.'" *Griffith v. Cleveland*, Slip Opinion No. 2010-Ohio-4905, ¶22.

{¶31} The controversy in the case at bar centers on the word "reinstatement," a term undefined by R.C. Chapter 4123. While Gohman argues the term connotes reinstatement with uninterrupted seniority and benefits, Atlas demands a more limited construction, meaning reinstatement to the position Gohman held on the date of termination. A review of other labor and industry statutes supports Atlas' interpretation.

{¶32} For instance, R.C. 4113.41(E), relating to termination due to an employee's status as a volunteer firefighter or emergency medical personnel, provides relief in the form of "reinstatement to the employee's former position of employment, payment of back wages, and full reinstatement of fringe benefits and *seniority rights*." (Emphasis added.) Similarly, Ohio's Whistleblower Statute, R.C. 4113.52(E), permits a court to order, among other remedies, "full reinstatement of fringe benefits and *seniority rights*[" (Emphasis added.)

{¶33} Such provisions demonstrate the General Assembly's ability to unreservedly articulate an intention to bestow uninterrupted seniority rights upon an aggrieved employee. The language within R.C. 4123.90, however, does not evince such intent. Rather, R.C. 4123.90 states, in pertinent part, "the relief which may be granted shall be *limited to* reinstatement with back-pay, if the action is based upon discharge, * * * plus reasonable attorney fees." (Emphasis added.) Thus, the plain language of R.C. 4123.90 clearly places limitations on relief available to an aggrieved employee, as opposed to other statutes that use considerably broader language regarding seniority.

{¶34} The Supreme Court of Ohio has stated "[i]n interpreting R.C. 4123.90 * * * [a]

court must apply the common and generally accepted meaning to the wording of the statute." *Bryant v. Dayton Casket Co.* (1982), 69 Ohio St.2d 367, 369. Further, while we acknowledge R.C. 4123.95 requires liberal construction of, among other provisions, R.C. 4123.90, in favor of an employee, it is also true that provision does not allow a court to read into a statute something which cannot be reasonably implied from the language of the statute. *State ex rel. Williams v. Colasurd*, 71 Ohio St.3d 642, 1995-Ohio-236; *Szekely v. Young* (1963), 174 Ohio St. 213, paragraph two of the syllabus. See, also, R.C. 1.42. We find it significant that R.C. 4123.90 uses the word "limited" in reference to the remedies it affords. From this, we can reasonably infer an intent to curtail the effect of reinstatement under this section. Accordingly, we decline to interpret R.C. 4123.90 in such a fashion as to afford an aggrieved employee full reinstatement with uninterrupted seniority rights.

{¶35} Gohman's third assignment of error is overruled.

{¶36} Judgment affirmed.

HENDRICKSON, J., concurs.

RINGLAND, J., concurs in part and dissents in part.

RINGLAND, J., concurring in part and dissenting in part.

{¶37} I agree with the majority's analysis and resolution of Gohman's second assignment of error regarding the denial of attorney fees at issue.

{¶38} Similarly, I agree with the majority's finding under the first assignment of error that res judicata prevents Gohman from asserting a claim seeking back pay for the period between the date of trial until the date of her court-ordered reinstatement. "The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel."

State ex rel. Schacter v. Ohio Pub. Emps. Retirement Bd., 121 Ohio St.3d 526, 2009-Ohio-1704, ¶27. This case involves the concept of claim preclusion.

{¶39} "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action." *Id.* "The previous action is conclusive for all claims that were or could have been litigated in the first action." *Id.*

{¶40} In this case, the trial court filed its first decision on March 15, 2010, finding Gohman's discharge retaliatory, awarded damages, and ordered Gohman's reinstatement. Further, the court found Gohman was entitled to attorney fees, but left the amount undetermined. This first decision was not a final appealable order. See *Stealth Investigations, Inc. v. Mid-Western Auto Sales, Inc.*, Butler App. No. CA2009-08-216, 2010-Ohio-327, ¶11-12. The parties could not settle upon an agreed amount of attorney fees and Gohman then filed an application for the court to determine fees along with a request for post-judgment interest for the damage award. In an entry filed May 24, 2010, the trial court awarded Gohman attorney fees totaling \$19,300, ordered her reinstatement within five business days, and restated the damage award plus post-judgment interest. With this entry, the trial court had reached a resolution on all issues pending in the case and the matter was final and appealable. Gohman then moved for additional back pay for the period between trial and the date of reinstatement.

{¶41} Gohman's claim for additional back pay is barred by res judicata because a valid final judgment had already been rendered by the trial court on all issues in the case. See *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 114 Ohio St.3d 183, 2007-Ohio-3831, ¶54. She was capable of raising the issue prior to the trial court issuing its final appealable order, but failed to do so. *Id.*

{¶42} However, I disagree with the second portion of the majority's analysis in

Gohman's first assignment of error. The majority claims that back pay could not be awarded for the period between the date of the final judgment and Gohman's reinstatement. The majority suggests that no authority exists to award back pay until reinstatement. The Revised Code provides that the relief that may be granted to an employee that has been subject to retaliation for filing a workers' compensation claim is "limited to reinstatement with back pay * * plus reasonable attorney fees." R.C. 4123.90. Nowhere in the statute does it state that back pay is limited to the date of judgment. "The purpose of a back-pay award is to make a wrongfully terminated employee whole and to place that employee in the position the employee would have been in absent [the] violation * * *." *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.*, 105 Ohio St.3d 476, 2005-Ohio-2974, ¶26. If Gohman had timely pursued her claim for additional back pay before the trial court rendered its final order, an award of back pay through the date of reinstatement would have been proper to place Gohman in the position she would have been in absent the unwarranted termination.

{¶43} Moreover, I disagree with the majority's analysis and resolution of Gohman's third assignment of error finding that Gohman is not entitled to a credit of seniority rights from the date of termination through her reinstatement. I would sustain Gohman's third assignment of error.

{¶44} A wrongfully terminated employee is entitled to "reinstatement with back pay * * plus reasonable attorney fees." R.C. 4123.90.

{¶45} The majority concludes a wrongfully terminated employee is not entitled to uninterrupted seniority rights due to "other labor and industry statutes" and because R.C. 4123.90 does not specifically state that the employee is entitled to seniority rights. On the other hand, however, the statute also does not specifically preclude a court from ordering reinstatement of an employee with all of the rights, privileges, and benefits lost following a retaliatory discharge, including seniority rights. West, *The Case Against Reinstatement in*

Wrongful Discharge (1988), 1988 U.Ill.L.Rev. 1, 30-31. See, also, Peck, Unjust Discharges from Employment: A Necessary Change in the Law (1979), 40 Ohio St.L.J. 1; and 94 Ohio Jurisprudence 3d (2010) 736, Workers' Compensation, Section 526. Quite simply, the statute is ambiguous regarding seniority rights. Id.

{¶46} The workers' compensation statute mandates that R.C. 4123.90 "be liberally construed in favor of employees." R.C. 4123.95. See, also, *Wires v. Doehler-Jarvis Div. of NL Industries, Inc.* (1974), 46 Ohio App.2d 40, 45 ("The enactment of [the workers' compensation] statute most probably resulted, in part, from the prior judicial use of procedural niceties to cause unjust results * * *[.]"). Moreover, it is well-established that the purpose and intent of the wrongful termination statute is to return the employee to the same position as he or she would have been in had the employee not been discharged. *Mechling v. K-Mart Corp.* (1989), 62 Ohio App.3d 46, 50.

{¶47} Through no fault of her own, Gohman was terminated from her position at Atlas on December 8, 2008. The trial court ordered her reinstatement within five business days of its entry filed May 24, 2010. Gohman was wrongfully terminated and waited over one and one-half years to be reinstated. Gohman's position at Atlas and amount of work she receives is based upon seniority and union status. Absent the retaliatory discharge, Gohman could have continued to work at Atlas and achieve union status. In order to make Gohman whole, the trial court should have credited Gohman with sufficient seniority rights to reflect the wrongful discharge and union status.

{¶48} Based upon the foregoing, I concur with the majority's resolution of the first and second assignments of error. I dissent with regard to the third assignment of error.

[Cite as *Gohman v. Atlas Roofing Corp.*, 2010-Ohio-5956.]