**[Cite as *Rose v. CTL Aerospace, Inc.*, 2012-Ohio-1596.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

| | | |
|---|---|---|
| ANTHONY SCOTT ROSE, | : | |
| Plaintiff-Appellant, | : | CASE NO. CA2011-09-171 |
| | : | O P I N I O N |
| - vs - | | 4/9/2012 |
| | : | |
| CTL AEROSPACE, INC., et al., | : | |
| Defendants-Appellees. | : | |

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2010-03-1408

John H. Forg, P.O. Box 72, West Chester, Ohio 45071-0072, for plaintiff-appellant

Thomas B. Allen, 9277 Centre Pointe Drive, Suite 300, West Chester, Ohio 45069, for defendants-appellees

**POWELL, P.J.**

**{¶ 1}** Plaintiff-appellant, Anthony Rose, appeals a decision of the Butler County Court of Common Pleas, granting a motion for partial judgment on the pleadings filed by his former employer, defendant-appellee, CTL Aerospace, Inc.

**{¶ 2}** The pertinent facts of the case are as follows: in 1989, Rose suffered a knee injury while working for a previous employer, OKI Industries. As a result of the injury, Rose filed a workers' compensation claim and underwent several surgeries, including a total knee

replacement. After working for several other companies, Rose began his employment with CTL in July 2008. Before he was hired, Rose had filed a claim for a second total knee replacement, which was approved by the Bureau of Workers' Compensation on August 21, 2009. On August 26, Rose informed his supervisors at CTL of the upcoming surgery and that he would need several months off to recover. Two days later, CTL terminated Rose, explaining it was eliminating several positions as part of a company-wide reduction in force due to an economic downturn.

**{¶ 3}** On March 26, 2010, Rose filed a complaint against CTL, alleging age discrimination (Count 1), and retaliatory discharge for seeking workers' compensation benefits in violation of Ohio public policy (Count 2). On May 7, 2010, CTL moved for partial judgment on the pleadings as to Count 2, which the trial court granted.[1] In its opinion, the trial court found R.C. 4123.90 (the Ohio workers' compensation anti-retaliation statute) did not provide a public policy claim for wrongful termination to an employee in Rose's situation. On August 4 and 5, 2011, the court held a jury trial on the remaining claim for age discrimination. The jury returned a verdict in favor of CTL, thereby resolving all claims prior to this appeal.

**{¶ 4}** Rose currently argues the trial court erroneously granted CTL's motion for partial judgment on the pleadings, raising two "issues" for review. For purposes of discussion, we will treat these issues as separate assignments of error.

**{¶ 5}** Assignment of Error No. 1:

**{¶ 6}** THE TRIAL COURT ERRED IN HOLDING THAT R.C. §4123.90 PROVIDES THE EXCLUSIVE REMEDY FOR A WRONGFUL TERMINATION IN RETALIATION FOR

1. In an earlier appeal to this court, Rose challenged the trial court's dismissal of Count 2. In an accelerated judgment entry, we dismissed the appeal for lack of a final appealable order on the grounds that Count 1 was still pending before the trial court. *See Rose v. CTL Aerospace, Inc.*, 12th Dist. No. CA2010-07-162 (Oct. 25, 2010) (accelerated calendar judgment entry).

SEEKING WORKERS COMPENSATION BENEFITS. [sic.]

**{¶ 7}** An appellate court reviews the trial court's decision on a Civ.R. 12(C) motion for judgment on the pleadings de novo and considers all legal issues without deference to the trial court's decision. *McGlothin v. Schad*, 194 Ohio App.3d 669, 2011-Ohio-3011, ¶ 10 (12th Dist.). "Civ.R. 12(C) motions are for resolving questions of law, and the determination made on the pleading is based solely on the allegations in the pleadings." *Id.*, citing *Peterson v. Teodosio*, 34 Ohio St.2d 161, 165-166 (1973). Under Civ.R. 12(C), the court may consider all of the pleadings, along with any writings attached to the pleadings. *Schad* at ¶ 10; *Golden v. Milford Exempted Village School Bd. of Edn.*, 12th Dist. No. CA2008-10-097, 2009-Ohio-3418, ¶ 6. A judgment on the pleadings is appropriate if the court finds, beyond doubt, that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Milford* at ¶ 6. In ruling on a Civ.R. 12(C) motion, this court must accept as true all the material allegations in the complaint, with all reasonable inferences to be drawn in favor of the nonmoving party. *Schad* at ¶ 10; *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-Ohio-5409, ¶ 2.

**{¶ 8}** Here, Rose argues the trial court erred when it granted CTL's motion for judgment on the pleadings as to his public policy claim for wrongful termination. Conversely, CTL contends the dismissal was appropriate because Rose's sole remedy was under R.C. 4123.90.

**{¶ 9}** Pursuant to R.C. 4123.90, it is unlawful for an employer to "discharge * * * 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." Embedded in the statute is a clear public policy that employers not retaliate against employees who exercise their statutory right to file a workers' compensation claim or pursue workers'

compensation benefits. *See, e.g., White v. Mt. Carmel Med. Ctr.*, 150 Ohio App.3d 316, 2002-Ohio-6446, ¶ 35 (10th Dist.).

**{¶ 10}** Both parties agree that Rose does not have a statutory claim under R.C. 4123.90, as his injury did not occur during the course of, or arise out of, his employment with CTL. However, Rose argues he has a common law cause of action for wrongful discharge in violation of public policy, based on his pursuit of workers' compensation benefits, namely time off to recover from a previous "work-related injury." Rose relies on the Ohio Supreme Court's recent decision in *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, for the proposition that employees without a statutory remedy retain a public policy claim for wrongful termination. On the other hand, CTL argues *Sutton* only carves out a narrow exception to the general rule previously established in *Bickers v. W. & S. Life Ins. Co.*, 116 Ohio St.3d 351, 2007-Ohio-6751, and that R.C. 4123.90 is the exclusive remedy for employees alleging wrongful termination in violation of rights conferred by the Workers' Compensation Act (the "Act"). CTL further contends the *Sutton* exception does not apply to Rose.

**{¶ 11}** In *Bickers*, the Ohio Supreme Court held:

> An employee who is terminated from employment while receiving workers' compensation has no common-law cause of action for wrongful discharge in violation of the public policy underlying R.C. 4123.90, which provides the exclusive remedy for employees claiming termination in violation of rights conferred by the Workers' Compensation Act.

*Id.* at syllabus. In *Bickers*, the plaintiff was terminated while receiving workers' compensation benefits for an injury she received on the job, and she filed a complaint for wrongful discharge alleging she was terminated in violation of Ohio public policy. The First District Court of Appeals agreed. On discretionary appeal, the Supreme Court reversed, finding R.C. 4123.90 foreclosed the public policy claim.

**{¶ 12}** Rose attempts to distinguish *Bickers*, arguing it is limited to dismissals of employees due to *nonretaliatory* reasons. Rose argues that because he is alleging a retaliatory firing, *Bickers* does not bar his common law claim.

**{¶ 13}** In the body of the *Bickers* opinion, the Supreme Court does state R.C. 4123.90 precludes public policy claims for dismissal for "nonretaliatory" reasons; however, the bulk of the opinion indicates the court's belief that the statute precludes *all* common law claims for wrongful discharge. *Bickers*, 2007-Ohio-6751 at ¶ 19-22, 25 (R.C. 4123.90 "supplanted, rather than amended or supplemented, the unsatisfactory common-law remedies;" "employees relinquish their common law remedy"). Moreover, according to Rule 1(B)(2) of the Ohio Supreme Court Rules for the Reporting of Opinions, "[i]f there is a disharmony between the syllabus of an opinion and its text or footnotes, the syllabus controls." Thus, we are obligated under this rule to apply the holding as stated in the *Bickers* syllabus. *See, e.g., McDonald v. Mt. Perry Foods, Inc.*, S.D.Ohio No. C2:09-CV-0779, 2011 WL 3321470, * 18 (Aug. 2, 2011). *See also Mortensen v. Intercontinental Chem. Corp.*, 178 Ohio App.3d 393, 2008-Ohio-4723, ¶ 15 (1st Dist.) (*Bickers* dictates R.C. 4123.90 is the "exclusive remedy for employees claiming termination in violation of rights conferred by the Workers' Compensation Act"); *Amara v. ATK, Inc.*, S.D.Ohio Nos. 3:08cv00378, 3:08cv00427, 2009 WL 2730528, * 4; *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 10th Dist. No. 09AP-523, 2009-Ohio-6574, ¶ 12.

**{¶ 14}** Rose argues, however, that the Ohio Supreme Court's subsequent decision in *Sutton* created an exception to *Bickers* for employees like him, who allege retaliatory termination, but lack a remedy under R.C. 4123.90. In *Sutton*, the employee was terminated one hour after incurring a work-related injury, before he could file a workers' compensation claim. As a result, the employee brought an action against the employer, raising both statutory and public policy claims for retaliatory discharge. The Ohio Supreme Court upheld

the appellate court's determination that the discharge violated public policy as expressed in R.C. 4123.90. The court explained that while R.C. 4123.90 does not expressly prohibit retaliation against employees during the time between their injury and the filing of a workers' compensation claim, employees falling into this "gap" were nonetheless protected by the public policy embedded in the statute. *Id.* at ¶ 22.

**{¶ 15}** Rose contends *Sutton* establishes a sweeping bright-line rule that employees without a statutory remedy under R.C. 4123.90 may instead pursue a public policy claim for wrongful discharge. CTL argues that *Sutton* creates a very narrow exception to the general rule established in *Bickers*, and that Rose cannot avail himself of the *Sutton* exception, which grants a public policy claim only to injured employees who are terminated "*before the employee files a workers' compensation claim* * * *." (Emphasis added.) *Sutton*, 2011-Ohio-2723 at ¶ 24. We agree with CTL.

**{¶ 16}** In *Sutton*, the supreme court found Ohio public policy protects employees who suffer retaliation "between the time immediately following injury and the time in which a [workers' compensation] claim is filed, instituted, or pursued." *Id.* at ¶ 14. In so holding, the court explained that the General Assembly did not intend to leave unprotected employees who "might" pursue a workers' compensation claim in the future. *Id.* at ¶ 22. Pursuant to this rationale, we believe *Sutton* creates a very limited exception to the at-will employment doctrine for injured employees who suffer retaliation prior to instituting or pursuing a workers' compensation claim. It follows that employees like Rose with a pending or existing workers' compensation claim at the time of the alleged retaliation cannot benefit from the *Sutton* exception. Additionally, we do not believe the court intended to apply the policy to a subsequent employer like CTL, who was not the source of the injury and who discharged Rose, an at-will employee, for economic reasons. *See id.* at ¶ 14, 24 (Ohio public policy protects employees against retaliation occurring "immediately" after the injury).

**{¶ 17}** Similarly unavailing is Rose's reliance upon *Collins v. United States Playing Card Co.*, 466 F.Supp.2d 954 (S.D.Ohio 2006), for a public policy exception. *Collins* was decided before *Bickers*, at a time when the Ohio Supreme Court had yet to address whether the public policy embedded in the Workers' Compensation Act gives rise to a common law claim for wrongful discharge. As previously discussed, *Bickers* has since addressed this very issue and, aside from the very limited exception in *Sutton*, maintains that R.C. 4123.90 is the "exclusive remedy" for employees claiming wrongful discharge under the Act. *Bickers*, 2007-Ohio-6751 at syllabus.

**{¶ 18}** Thus, the trial court did not err in finding R.C. 4123.90 was the sole remedy available to Rose, given his situation. Rose's first assignment of error is overruled.

**{¶ 19}** Assignment of Error No. 2:

**{¶ 20}** ROSE HAS PLED A VIABLE CLAIM FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY BASED UPON CTL'S TERMINATION OF HIS EMPLOYMENT AFTER EXERCISING HIS RIGHT TO UNDERGO SURGERY FOR A PRIOR WORKPLACE INJURY.

**{¶ 21}** Rose next argues he has pleaded a viable claim for wrongful termination in violation of public policy. Although we have already rejected Rose's public policy argument, we will briefly address this assignment of error, as it includes an additional issue not previously discussed.

**{¶ 22}** To establish a prima facie claim of wrongful discharge in violation of public policy, the employee must demonstrate the following four elements:

> 1. That clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the *clarity* element).
>
> 2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the *jeopardy* element).

> 3. The plaintiff's dismissal was motivated by conduct related to the public policy (the *causation* element).
>
> 4. The employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element).

(Emphasis sic.) *Collins v. Rizkana*, 73 Ohio St.3d 65, 69-70 (1995), quoting *Painter v. Graley*, 70 Ohio St.3d 377, fn. 8 (1994). The clarity and jeopardy elements involve questions of law, whereas the causation and overriding justification elements involve questions of fact. *Rizkana* at 70.

**{¶ 23}** This case is an appeal from a judgment on the pleadings, which is a mechanism used to resolve questions of law. *See, e.g., State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570 (1996). Consequently, the factual elements, i.e., causation and overriding justification, are not before us, and we need only consider the clarity and jeopardy elements.

**The Clarity Element**

**{¶ 24}** Under the clarity analysis, we must determine whether there is a clear public policy against retaliatory employment actions like the one alleged by Rose. The Ohio Supreme Court has held:

> 'Clear public policy' sufficient to justify an exception to the employment-at-will doctrine is not limited to public policy expressed by the General Assembly in the form of statutory enactments, but may also be discerned as a matter of law based on other sources, such as the Constitutions of Ohio and the United States, administrative rules and regulations, and the common law.

*Graley* at paragraph three of the syllabus. Here, Rose identifies two cases as the source of public policy supporting his position, namely, *Sutton* and *Coolidge v. Riverdale Local School Dist.*, 100 Ohio St.3d 141, 2003-Ohio-5357. We find neither case expresses a clear public policy applicable to Rose.

**{¶ 25}** As previously discussed, *Sutton* recognized a public policy that protects employees who (1) are injured on the job, and (2) suffer retaliation immediately after the injury, but *before* filing or pursuing a workers' compensation claim. *Sutton*, 2011-Ohio-2723 at ¶ 14, 24. Rose clearly does not fall into this category, as he had an existing workers' compensation claim at the time of the alleged retaliation. Moreover, we find that we are not at liberty to extend this public policy claim to employees in situations apart from the one described in *Sutton*. *See id.* at ¶ 45 (Cupp, J., dissenting). Had the Supreme Court intended to include employees affected during other time frames, it certainly could have done so. Moreover, it is the General Assembly's prerogative, not ours, to determine whether the basis of Rose's claim should be part of Ohio's public policy. *See Bickers*, 2007-Ohio-6751 at ¶ 24 ("it is the legislature, and not the courts [that determines] * * * the policy compromises necessary to balance the obligations and rights of the employer and employee in the workers' compensation system"); *Graley*, 70 Ohio St.3d at 385 ("[j]udicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy").

**{¶ 26}** Likewise, Rose cannot rely on *Coolidge* to establish a relevant public policy. In *Bickers*, the Supreme Court clearly limited *Coolidge* to considerations of "good and just cause" for termination under R.C. 3319.16. *Bickers* at ¶ 2. The court continued, explaining *Coolidge* "does not create a claim of wrongful discharge in violation of public policy for an employee who is discharged while receiving workers' compensation." *Id.*, quoting *Coolidge*, 2003-Ohio-5357 at ¶ 52.

**{¶ 27}** Accordingly, Rose has failed to articulate a clear public policy that CTL violated when it discharged him. Because the clarity element is essential to the survival of Rose's claim, we are not required to address the additional "jeopardy element." Civ.R. 12(C); *Rizkana*, 73 Ohio St.3d at 69-70. However, we will address the jeopardy element because it

provides an independent reason for dismissal.

**The Jeopardy Element**

**{¶ 28}** Under the jeopardy analysis, we must determine whether the retaliatory dismissal of an employee in Rose's position jeopardizes the public policy underlying R.C. 4123.90. *Rizkana* at 70. Rose argues his termination jeopardizes the policies expressed in *Sutton*, *Collins*, and *Coolidge*. We disagree.

**{¶ 29}** First, Rose's termination does not invoke, let alone jeopardize, the public policy expressed in *Sutton*, because he did not suffer the alleged retaliation before filing his workers' compensation claim. *See Sutton*, 2011-Ohio-2723 at ¶ 14. Rose's reliance on *Collins* and *Coolidge* is equally misplaced, because *Collins* is a pre-*Bickers* case and *Coolidge* only applies to R.C. 3319.16. *See Collins*, 466 F.Supp.2d 954. Thus, under the current state of the law, discharging an employee in Rose's position does not jeopardize the public policy embedded in R.C. 4123.90.

**{¶ 30}** Based upon the foregoing, we find CTL was entitled to judgment on the pleadings as to Rose's public policy claim for wrongful discharge under the Ohio Workers' Compensation Act. Civ.R. 12(C). Rose's second assignment of error is overruled.

**{¶ 31}** Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.