[Cite as *Hooks v. Dept. of Rehab. & Corr.*, 2008-Ohio-7046.]

Court of Claims of Ohio
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

JACK HOOKS

Plaintiff

v.

DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant
Case No. 2007-05784

Judge J. Craig Wright

DECISION

{¶ 1} On September 30, 2008, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). Plaintiff did not file a response. An oral hearing on defendant's motion was scheduled for October 31, 2008; however, plaintiff failed to appear at the hearing. The case is now before the court for a determination on defendant's motion. See Civ.R. 56(C) and L.C.C.R. 4(D).

{¶ 2} Civ.R. 56(C) states, in part, as follows:

{¶ 3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party

against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." See also *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶ 4} Plaintiff was employed by defendant from 1990 to 2005 as a corrections officer at the Mansfield Correctional Institution (ManCI). Plaintiff alleges that a work-related spinal injury prevented him from working for several months in 2005 and that he gave defendant "proper notification that he would not be coming to work" during this time. Plaintiff relates that defendant nevertheless terminated his employment on June 19, 2005, for absenteeism.

{¶ 5} Plaintiff brings this action claiming wrongful termination, wrongful termination in violation of public policy, and violation of the federal Family and Medical Leave Act (FMLA).

{¶ 6} In his wrongful termination claim, plaintiff alleges that the termination of his employment violated the collective bargaining agreement under which he was employed. Defendant argues that the Court of Claims lacks subject matter jurisdiction over such a claim.

{¶ 7} R.C. 4117.09 provides the following in regard to public employee collective bargaining agreements:

{¶ 8} "(B) The agreement shall contain a provision that:

{¶ 9} "(1) Provides for a grievance procedure which may culminate with final and binding arbitration of unresolved grievances, and disputed interpretations of agreements, and which is valid and enforceable under its terms when entered into in accordance with this chapter. No publication thereof is required to make it effective. *A party to the agreement may bring suits for violation of agreements or the enforcement of an award by an arbitrator in the court of common pleas of any county wherein a party resides or transacts business*." (Emphasis added.)

{¶ 10} Inasmuch as R.C. 4117.09 grants exclusive jurisdiction over a claim for violation of a collective bargaining agreement to the courts of common pleas, the Court of Claims lacks jurisdiction over such actions. See *Moore v. Youngstown State Univ.* (1989), 63 Ohio App.3d 238.

{¶ 11} Next, plaintiff asserts a claim for wrongful termination in violation of public policy in accordance with the holding of the Supreme Court of Ohio in *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228. However, "a *Greeley* cause of action is available only to at-will employees and may not be asserted by employees subject to a collective bargaining agreement." *Atakpu v. Cent. State Univ.* (Aug. 2, 2001), Franklin App. No. 00AP-1113; see also *Haynes v. Zoological Soc. of Cincinnati* (1995), 73 Ohio St.3d 254, syllabus. Inasmuch as plaintiff's employment was governed by a collective bargaining agreement, he cannot maintain a claim for wrongful termination in violation of public policy.

{¶ 12} Finally, plaintiff claims that the termination of his employment violated unspecified rights to which he was entitled under the FMLA. Defendant contends that plaintiff was not entitled to rights under the FMLA at any time relevant to this case because he was not an "eligible employee" pursuant to the statutory definition of that term within the FMLA.

{¶ 13} The FMLA allows that "an *eligible employee* shall be entitled to a total of 12 workweeks of leave during any 12-month period" for a qualifying family or medical reason. 29 U.S.C. §2612(a)(1). (Emphasis added.) As used within the FMLA, "eligible employee" is defined at 29 U.S.C. §2611(2)(A) as "an employee who has been employed (i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and (ii) *for at least 1,250 hours of service with such employer during the previous 12-month period*." (Emphasis added.)

{¶ 14} In support of its motion for summary judgment, defendant submitted the affidavit of Janet Tobin, Labor Relations Officer for ManCI. Tobin states in her affidavit that at all times relevant to this action, plaintiff "failed to work the requisite number of hours to be eligible for FMLA." According to Tobin, plaintiff took long, unauthorized leaves of absence from work beginning in 2003 and continuing until defendant terminated his employment on June 19, 2005. Tobin states that plaintiff attempted to use FMLA leave in August 2004, but defendant found him ineligible because he had worked only 1,086 hours in the previous twelve months.

{¶ 15} Based on the uncontested affidavit testimony of Tobin, plaintiff had worked less than 1,250 hours in the previous twelve-months. Thus, the only reasonable

conclusion to draw from the evidence is that plaintiff was not an "eligible employee" under the FMLA and that he is therefore precluded from bringing an action based thereon.

{¶ 16} As stated above, plaintiff did not file a response to defendant's motion, nor did he provide the court with any affidavit or other permissible evidence to support his allegations. As the non-moving party, plaintiff has the burden of producing more than a scintilla of evidence in support of his claims. *Nu-Trend Homes, Inc. v. Law Offices of DeLibera, Lyons & Bibbo*, Franklin App. No. 01AP-1137, 2003-Ohio-1633, at ¶17.

{¶ 17} Civ.R. 56(E) states, in part, as follows:

{¶ 18} "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶ 19} For the foregoing reasons, the court finds that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. Accordingly, defendant's motion for summary judgment shall be granted and judgment shall be rendered in favor of defendant.

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JUDGMENT ENTRY

A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____
J. CRAIG WRIGHT
Judge

cc:

Eric A. Walker
Velda K. Hofacker Carr
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Jack Hooks
930 Garver Road
Mansfield, Ohio 44903

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