[Cite as *Dover v. Carmeuse Natural Chemicals*, 2010-Ohio-5657.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JAMES MATTHEW DOVER

Plaintiff-Appellant

-vs-

CARMEUSE NATURAL CHEMICALS, et al.

Defendant-Appellee

JUDGES:
Hon. Julie A. Edwards, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 10-CA-8

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 08-CV-00420
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 18, 2010

APPEARANCES:

For Plaintiff-Appellant

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Wise, J.

{¶1} Appellant James Matthew Dover appeals the decision of the Perry County Court of Common Pleas granting Appellee Carmeuse Natural Chemicals' Motion for Summary Judgment.

STATEMENT OF THE FACTS AND CASE

{¶2} The relevant facts are as follows:

{¶3} Appellant James Matthew Dover began working for Appellee Carmeuse Natural Chemicals in October, 2001.

{¶4} Appellee Carmeuse has a neutral attendance/call-in policy which is contained in Article 17 of its Collective Bargaining Agreement (CBA), which provides, in pertinent part:

{¶5} "a. when an employee is absent from work for three (3) consecutive working days and fails to notify management for the same period, such lack of notification will be considered a voluntary resignation."

{¶6} On January 14, 2008, Appellant did not report to work, leaving a message on his supervisor, Steve Dittoe's voicemail five to fifteen minutes before his shift was schedule to begin.

{¶7} On January 15, 2008, Appellant was working as a tramway maintenance mechanic when he was injured on the job. The injury occurred when he grabbed an ore bucket loaded with crushed sandstone in an attempt to intercept it and stop it and was dragged six or seven feet. (Id. at 94).

{¶8} Appellant filled out an accident report and left the plant, driving himself to the doctor. (Id. at 105-107). At 5:25 p.m., Appellant called his supervisor, Steve Dittoe,

and advised him that he was injured, with his arm in a sling, and that he would not be able to report to work for a while. (Id. at 319).

{¶9} Appellant did not call in to work the next day, January 16th, to call off work. (Id. at 320).

{¶10} On January 17, 2008, Appellant placed a call to work and spoke with his supervisor, Dittoe. (Id. at 320).

{¶11} On January 18, 2008, Appellant called in and spoke with his supervisor, Dittoe, who advised him that he needed to contact the plant manager, Lloyd Detra. Id.

{¶12} On January 24, 2008, Detra sent a certified letter to Appellant informing him that failure to provide a doctor's excuse within twenty-four (24) hours with specific instructions as to Appellant's restrictions and time off work would result in termination from employment based on absenteeism.

{¶13} On January 25, 2008, Appellant sent Detra an e-mail which stated that it contained his doctor's slip as an attachment but in fact contained no attachments.

{¶14} On January 28, 2008, Appellant again sent an e-mail to Detra with his doctor's excuse attached. Appellant also called Dittoe, who advised him to called Detra. (Id. at 323).

{¶15} Appellant did not call in again until February 5, 2008, when he spoke with Dittoe and Phyllis Goldsmith, an administrative assistant.

{¶16} Appellant did not call in again and on March 28, 2008, he received a termination letter by certified mail.

{¶17} On September 29, 2008, Appellant filed a Complaint in the Perry County Common Pleas Court. This Complaint contained three causes of action: a claim for

discharge in retaliation for the filing of a worker's compensation claim; a claim for violation of public policy; and a claim for intentional tort.

{¶18} On November 12, 2008, Appellee filed a Motion for Judgment as to the claim for violation of public policy, wherein it argued that state law did not allow for a wrongful discharge claim premised solely on public policy. This motion was granted on November 24, 2008.

{¶19} On December 9, 2008, Appellant filed an Amended Complaint containing two counts alleging retaliatory discharge in violation of R.C. §2745.01 and intentional tort.

{¶20} On December 16, 2009, Appellant filed a Motion for Summary Judgment.

{¶21} On February 22, 2010, the trial court granted Appellant's motion.

{¶22} Appellant filed a notice of appeal to this Court, and herein raises the following Assignments of Error:

ASSIGNMENTS OF ERROR

{¶23} "I. COLLECTIVE BARGAINING AGREEMENTS DO NOT BAR ACTIONS AGAINST AN EMPLOYER THAT ASSERT RIGHTS INDEPENDENT OF THAT AGREEMENT.

{¶24} "II. AN EMPLOYER IS PROHIBITED FROM TERMINATING THE EMPLOYMENT OF A WORKER FOR ABSENTEEISM WHEN THE ABSENCE FROM WORK IS DUE TO A WORKPLACE INJURY.

{¶25} "III. INTENT TO CAUSE INJURY TO AN EMPLOYEE SUFFICIENT TO STATE A CAUSE OF ACTION PURSUANT TO OHIO REVISED CODE SECTION 2745.01 CAN BE INFERRED FROM THE EMPLOYER'S CONDUCT."

"Summary Judgment Standard"

{¶26} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. Civ.R. 56(C) provides, in pertinent part:

{¶27} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, 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. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, 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, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

{¶28} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of

material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107.

{¶29} It is based upon this standard that we review Appellant's assignments of error.

I.

{¶30} In his first assignment of error, Appellant argues that the trial court erred in finding that his retaliatory discharge claim was pre-empted by Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185(a).

{¶31} In its Judgment Entry, the trial court found:

{¶32} "After reviewing the filings herein, this Court finds that there is no question of material fact that the Defendant has complied with the requirements of the Collective Bargaining Agreement and that the Plaintiff did on more than one occasion fail to communicate with the Defendant for at least three (3) consecutive days regarding the Plaintiff's absence from employment. Therefore, this Court finds that the Defendant's stated reason for the Plaintiff's termination was not a pretext for illegal retaliation."

{¶33} It is clear from the trial court's entry that it did not find that Appellant's claim was pre-empted and did in fact consider the retaliatory discharge claim, finding that Appellant failed to comply with the absenteeism provisions contained in the CBA.

{¶34} Appellant's First Assignment of Error is overruled.

II.

{¶35} In his second assignment of error, Appellant argues that the trial court erred in granting summary judgment on his retaliatory discharge claim. We disagree.

{¶36} R.C. §4123.90 prohibits employers from taking an adverse employment action against an employee because he filed, or pursued, a workers' compensation claim for an injury which arose and occurred in the course of his employment with the employer.

{¶37} R.C. §4123.90 provides, in pertinent part:

{¶38} "No employer shall discharge, demote, reassign, or take any punitive action against 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."

{¶39} "The scope of the statute is nevertheless narrow, and R.C. §4123.90 does not prevent an employer from [taking an adverse employment action against] an employee who is unable to perform his or her duties * * * [or] for just and lawful reasons. The statute protects only against [adverse employment actions] in direct response to the filing or pursuit of a workers' compensation claim." *White v. Mt. Carmel Med. Ctr.*, 150 Ohio App.3d 316, 2002-Ohio-6446, ¶ 36, quoting *Sidenstricker v. Miller Pavement Maintenance, Inc.*, Franklin App. Nos. 00AP-1146 and 00AP-1460, 2001-Ohio-4111, ¶ 55. "An employee may assert a claim under this statute only if he alleges and proves that he was demoted or dismissed, not because of his job-related injury, but rather because of his pursuit of a workers' compensation claim." *Blair v. Milford Exempted*

Village School Dist. Bd. of Edn. (1989), 62 Ohio App.3d 424, 431, abrogated on other grounds by *Coolidge v. Riverdale Local School Dist*., 100 Ohio St.3d 141, 2003-Ohio-5357.

{¶40} Courts in Ohio have addressed claims filed pursuant to R.C. §4123.90 under a burden-shifting framework. See, e.g., *Young v. Stelter & Brinck, Ltd*., 174 Ohio App.3d 221, 2007-Ohio-6510, ¶ 20-21; *Wysong v. Jo Ann Stores, Inc.*, Montgomery App. No. 21412, 2006-Ohio-4644, ¶ 10; *Rollison v. Ball*, Marion App. No. 9-05-48, 2006-Ohio-5153, ¶ 19; *Stone v. Martin Marietta Energy Sys., Inc*. (Oct. 5, 1998), Washington App. No. 97CA602; *Kilbarger v. Anchor Hocking Glass Co*. (1997), 120 Ohio App.3d 332, 337-40; *Napier v. Roadway Freight, Inc.*, Lucas App. No. L-06-1181, 2007-Ohio-1326, ¶ 12; *Cunningham v. Steubenville Orthopedics & Sports Medicine*, Inc., 175 Ohio App.3d 627, 2008-Ohio-1172, ¶ 56; *Markham v. Earle M. Jorgensen Co*. (2000), 138 Ohio App.3d 484, 492; Herron v. DTJ Ents., Inc., Summit App. No. 22796, 2006-Ohio-1040, ¶ 16; *White* at ¶ 37; *Prox v. Cleveland Steel Container Corp.*, Trumball App. No. 2005-T-0045, 2006-Ohio-2770, ¶ 24-26; *McDannald v. Fry & Assoc., Inc*., Madison App. No. CA2007-08-027, 2008-Ohio-4169, ¶ 17. This burden-shifting analysis is applied in the absence of direct evidence of retaliation. *Wysong v. Jo Ann Stores, Inc*., at ¶ 10; Cf. *Kohmescher v. Kroger Co*. (1991), 61 Ohio St.3d 501.

{¶41} Under the burden-shifting scheme, the employee must first set forth a prima facie case of retaliation, then the burden shifts to the employer to set forth a legitimate non-retaliatory reason for the adverse employment action and, finally, the burden shifts back to the employee to establish that the employer used that non-retaliatory reason as a pretext for the adverse employment action. *Markham* at 492.

"The burden of proving that the employer had a retaliatory motive remains at all times on the employee." Id.

{¶42} In establishing a prima facie case of retaliation, an employee must show that he: (1) was injured on the job, (2) filed a workers' compensation claim, and (3) suffered an adverse employment action in contravention of R.C. §4123.90. *Kilbarger* at 337-338.

{¶43} "'The burden of establishing a prima facie case of retaliation is not onerous and is easily met." *Wysong* at ¶ 12, quoting *Greer-Burger v. Temesi*, Cuyahoga App. No. 87104, 2006-Ohio-3690, ¶ 15; *Meyer v. United Parcel Serv., Inc*., 174 Ohio App.3d 339, 2007-Ohio-7063, ¶ 53, reversed on other grounds by Slip Opinion No.2009-Ohio-2463. The activity protected by R.C. §4123.90 is triggered when an "employee file[s] a claim or institute[s], pursue[s] or testifie[s] in any proceedings under the workers' compensation act." While a discharge, demotion, reassignment, or any punitive action taken by the employer constitutes an adverse employment action under R.C. §4123.90.

{¶44} "If the plaintiff establishes his or her prima facie case, then the burden of production shifts to the employer to articulate a legitimate non-retaliatory reason for its action." *Sidenstricker* at ¶ 59. "[T]he burden does not require the employer to prove the absence of a retaliatory discharge. It merely requires the employer to set forth a legitimate, non-retaliatory reason for the employee's discharge." *Kilbarger* at 338. "When considering whether an employer has a legitimate non-retaliatory reason for discharging an employee, the court must keep in mind the fact that an employee who files a workers' compensation claim is not insulated from discharge." *Markham*, 138

Ohio App.3d at 492. “R.C. 4123.90 does not operate to suspend the rights of an employer nor does it insulate an employee from otherwise lawful actions taken by the employer. To hold otherwise would render employers virtually powerless to combat fraud and/or blatant inefficaciousness on the part of any employee who happened to have a pending workers' compensation claim.” Id. at 494.

{¶45} “[I]f the employer sets forth a legitimate, non-retaliatory reason, the burden once again shifts to the employee * * * [who] must then establish that the reason articulated by the employer is pre-textual and that the real reason for the discharge was the employee's filing of a claim under the Ohio Workers' Compensation Act.” *Kilbarger* at 338. Pre-text may be shown in a variety of different manners. The employee may show that the employer's proffered reason: (1) had no basis in fact, (2) did not actually motivate the adverse employment action, or (3) was insufficient to motivate the adverse employment action. *Wysong* at ¶ 13; *King v. Jewish Home*, 178 Ohio App.3d 387, 2008-Ohio-4729, ¶ 9.

{¶46} In this case, Appellant clearly meets the first two elements required in a prima facie case. He filed a workers' compensation claim, and he suffered an adverse employment action when he was terminated from Appellee. The existence of a causal link is more difficult to ascertain.

{¶47} To establish a causal link, the employee must produce evidence sufficient to raise an inference that the filing of the workers’ compensation claim was the likely reason for the adverse employment action. *Young*, 174 Ohio App.3d at ¶ 23; *Wysong*, 2006-Ohio-4644 at ¶ 12, fn. 1. Trial courts should consider a “variety of factors to determine whether there was an inference of a retaliatory motive.” *Young* at ¶ 23.

Evidence that may be offered in support of an inference of retaliatory motive may include a showing that the exercise of the protected conduct was closely followed by the adverse employment action, although timing alone is insufficient to show a causal link. [1] Id. at 24; *Pflanz v. Cincinnati*, 149 Ohio App.3d. 743, 2002-Ohio-5492, ¶ 53. Other evidence may include, but is not limited to, punitive actions taken, such as bad performance reports, changes in salary level, hostile attitudes; evidence that the employer treated the employee differently from other employees; a request that the employee not file a workers' compensation claim; and/or evidence that the employee was on the work schedule past the date of termination. See, e.g., *Kent v. Chester Labs, Inc*. (2001), 144 Ohio App.3d 587, 592; *Lindsay v. Children's Hosp. Med. Ctr. of Akron*, Summit App. No. 24114, 2009-Ohio-1216, ¶ 13; *Wysong* at ¶ 12, fn. 1; Young at ¶ 26.

{¶48} The fact that Appellant was terminated approximately two and a half months after filing his claim, is, at the very least, minimal circumstantial evidence of a causal link. Based on the fact we need only find an inference of retaliation, and because we must construe the evidence most strongly in Appellant's favor we believe the timing of the discharge is arguably enough to get Appellant past the initial stage of the burden-shifting analysis.

{¶49} Because the burden then shifts to the employer to articulate a legitimate non-retaliatory reason for the adverse employment action, we must examine Appellee's

[1] It should be noted that "[t]he cases that accept mere temporal proximity between an employer's knowledge of [the] 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. Breeden* (2001), 532 U.S. 268, 273, 121 S.Ct. 1508.

reason for the discharge, which in this case was Appellant's failure to comply with the attendance/call-in policy.

{¶50} As set forth above, Appellee's attendance policy, which is incorporated into the CBA, contains the following pertinent provision:

{¶51} "when an employee is absent from work for three (3) consecutive working days and fails to notify management for the same period, such lack of notification will be considered a voluntary resignation."

{¶52} Appellant was absent from work for more than three consecutive days without contacting or notifying anyone at Carmeuse. Consistent with Appellee's absenteeism policy, Appellant was terminated. "[A]n employee's termination under an employer's * * * policy is not considered a retaliatory discharge if the company policy is neutral in its application." *Oliver v. Wal-Mart Stores, Inc.*, Franklin App. No. 02AP-229, 2002-Ohio-5005, ¶ 17, citing *Metheney v. Sajar Plastics, Inc.* (1990), 69 Ohio App.3d 428, 432. Appellee has established a legitimate non-retaliatory reason for Appellant's discharge.

{¶53} As the burden then shifts to Appellant to show that Appellee's reason for discharging him pursuant to his absenteeism was pre-textual, we must now determine whether Appellant carried his burden.

{¶54} Appellant must prove under the final stage of burden-shifting paradigm that Appellee's decision to discharge him based on a violation of the absenteeism policy: (1) had no basis in fact, (2) did not actually motivate the adverse employment action, or (3) was insufficient to motivate the adverse employment action.

{¶55} After viewing the evidence, we find that Appellee did in fact have an absenteeism policy as contained in the CBA with which Appellant failed to comply.

{¶56} Finally, we note that when questioned during his deposition about his attendance, Appellant admitted that his record was far from perfect:

{¶57} "Q. Now, you had a habitual absenteeism problem at the company.

{¶58} "A: I missed some work, yes." (Dover Depo. at 50)

{¶59} "Q: What were they working on with you? Absenteeism?

{¶60} "A: Yes.

{¶61} "Q: And also cut – and also the time you arrive and leave?

{¶62} "A: Yes.

{¶63} "Q: So you had problems with that, correct?

{¶64} "A: Yes." (Dover Depo. At 53).

{¶65} "Q. Did you have a pattern and a habit of just no-show, not calling in and just not showing up at times?

{¶66} "A. I'll say yes." (Dover Depo. at 61).

{¶67} Even after viewing the evidence in a light most favorable to Appellant, we do not believe any questions of material fact remain as to the reason of his discharge. Appellant was not fired in retaliation for filing a workers' compensation claim. He was terminated for absenteeism and failure to comply with Appellee's attendance policy. Appellant has not presented any evidence to show this reason was pre-textual. Therefore, summary judgment was properly granted in favor of Appellee.

{¶68} Accordingly, Appellant's second assignment of error is overruled.

III.

{¶69} In his third assignment of error, Appellant argues that the trial court erred in granting summary judgment on his intentional tort claim. We disagree.

{¶70} R.C. §2745.01 states in pertinent part:

{¶71} "(A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.

{¶72} "(B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

{¶73} " * * * "

{¶74} The Ohio Supreme Court recently decided *Kaminski v. Metal & Wire Products Company,* 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, holding R.C.§2745.01 to be constitutional. The Supreme Court directed courts to apply the statute instead of case law and consider the record in light of the statutory standards for an employer intentional tort. *Kaminski,* paragraph 103. See also *Stetter v. R.J. Korman Derailment Services, LLC,* 2010-Ohio-1027, decided the same day as *Kaminski.*

{¶75} In *Kaminski*, the Supreme Court held that "under R.C. 2945.01 the only way an employee can recover is if the employer acted with intent to cause injury." Id.

{¶76} In the instant case, we find no evidence of any act or omission on the part of Appellee which proximately caused Appellant's injury. Further, we do not find any evidence that Appellee acted with intent to injure Appellant. Appellant himself testified in his deposition that it was his decision to leave where he was standing and to "walk over and try to stop the bucket." (Dover Depo. At 137). Additionally, he testified that he was not aware of any other employee having ever been hurt due to two buckets coming out at the same time. Id. at 134.

{¶77} Appellant also attempted to argue "inferred intent". A review of the record below, however, reveals that appellant failed to raise this issue at the trial court level and argues it for the first time on appeal. It is well established that a party cannot raise any new issues or legal theories for the first time on appeal." *Dolan v. Dolan,* 11th Dist. Nos. 2000-T-0154 and 2001-T-0003, 2002-Ohio-2440*,* at ¶ 7, citing *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43, 322 N.E.2d 629. "Litigants must not be permitted to hold their arguments in reserve for appeal, thus evading the trial court process." *Nozik v. Kanaga* (Dec. 1, 2000), 11th Dist. No. 99-L-193. We find that appellant therefore has waived review of this issue by failing to raise it at the trial level.

{¶78} Appellant's third assignment of error is overruled.

{¶79} For the foregoing reasons, the judgment of the Court of Common Pleas of Perry County, Ohio, is affirmed.

By: Wise, J.

Edwards, P. J., and

Delaney, J., concur.

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JUDGES

JWW/d 0927

IN THE COURT OF APPEALS FOR PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JAMES MATTHEW DOVER	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
CARMEUSE NATURAL CHEMICALS, et al.	:	
	:	
	:	
Defendant-Appellee	:	Case No. 10-CA-8

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Perry County, Ohio, is affirmed.

Costs assessed to Appellant.

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JUDGES