[Cite as *Tatman v. Kaiser Aluminum Corp.*, 2010-Ohio-6402.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JAMES TATMAN Plaintiff-Appellant -vs- KAISER ALUMINUM CORP. Defendant-Appellee	JUDGES: Hon. William B. Hoffman, P.J. Hon. Sheila G. Farmer, J. Hon. John W. Wise, J. Case No. 10-CA-66 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Case No. 2008CV01092
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 23, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
KENDALL DUANE ISAAC 8802 Kingsley Drive Reynoldsburg, Ohio 43068	TODD L. SARVER LORI A. CLARY McDonald Hopkins LLC 41 South High Street, Suite 3550 Columbus, Ohio 43215

Hoffman, P.J.

{¶1} Plaintiff-appellant James Tatman appeals various judgment entries of the Licking County Court of Common Pleas in favor of Defendant-appellee Kaiser Aluminum Fabricated Products, LLC.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant worked for Appellee Kaiser Aluminum from 1976 until his discharge on December 10, 2007. On December 3, 2007, Appellant injured his back at work while reloading banding material onto a machine used to package aluminum for delivery. Appellant reported the injury then drove his car to the facility's first-aid office. The first-aid office gave Appellant an over-the-counter pain medication and suggested Appellant seek treatment at the nearby Licking Memorial Hospital. Instead, Appellant drove home, approximately forty-five minutes away, stating he would go to the hospital, if needed, after he went home.

{¶3} A few hours after arriving home, Appellant had his step-son drive him to Good Samaritan Hospital in Zanesville, Ohio. Prior to going to the hospital, Appellant took a pain medication from "an old prescription."

{¶4} Upon arrival at the hospital, the triage nurse asked Appellant whether he had been injured at work, and whether his employer required post-accident drug testing. Appellant claims he did not know whether his employer required the testing.

{¶5} Appellee's Safety and Security Coordinator Al Dantzer learned of Appellant's injury upon reporting to work on December 3, 2007, and was informed Appellant had sought treatment at a hospital other than the nearby hospital. Dantzer attempted to contact Appellant at home, but was unsuccessful. Dantzer then learned

Appellant was undergoing treatment at Good Samaritan Hospital and called the hospital directly.

{¶6} Dantzer inquired as to whether Appellant had undergone drug testing while at the hospital. The triage nurse told Dantzer she would have the testing completed and would provide Dantzer with the results. Dantzer later learned from Appellant he had not undergone the drug and alcohol test because he did not think he needed to do so because he did not want to file a workers' compensation claim as he had hurt himself at home over the weekend. In a subsequent phone conversation, Dantzer informed Appellant he did need to undergo the drug and alcohol testing, and could do so either at Good Samaritan Hospital or Licking Memorial Hospital.

{¶7} Good Samaritan Hospital Nurse Amanda Collins testified at deposition Appellant was informed during his treatment of the requirement to undergo post-accident testing as a routine condition of his injury.

{¶8} Appellant returned to work on the evening of December 4, 2007. Upon arrival, Appellant's supervisor inquired of Appellant whether at the hospital had spoke with him about drug and alcohol testing. Appellant stated they had not done so. As a result, Appellant was issued a Notice of Warning and a five-day suspension subject to discharge based upon the conclusion Appellant had declined to submit to a drug and alcohol test after having been advised to do so. Appellant refused to sign the warning.

{¶9} On December 7, 2007, Appellant met with representatives from the Local Union and Appellee's representatives to discuss the incident. Appellant was then informed the suspension would be converted to a discharge effective December 10, 2007, because of Appellant's violation of company policy.

{¶10} The local union steward filed a grievance on Appellant's behalf. On January 15, 2008, the parties conducted a Step Four grievance meeting pursuant to the Collective Bargaining Agreement between Appellee and the United Steelworkers Local 341. At the conclusion of the hearing, the union accepted Appellee's position Appellant's discharge was for cause.

{¶11} On May 30, 2008, Appellant filed the within action alleging claims for wrongful discharge in violation of public policy, worker's compensation retaliation, age discrimination pursuant to R.C. 4112.02 and 4112.99, and estoppel.

{¶12} Appellee Kaiser Aluminum moved for summary judgment on all of Appellant's claims. Via Judgment Entry of May 1, 2009, the trial court granted Appellee summary judgment on the wrongful discharge and estoppel claims.

{¶13} On September 30, 2009, Appellee filed a motion to dismiss Appellant's workers' compensation retaliation claim, and the trial court granted the same via Judgment Entry of October 28, 2009.

{¶14} Via Judgment Entry of June 3, 2010, the trial court granted Appellee summary judgment on the age discrimination claim, holding the Ohio Supreme Court's intervening decision in *Meyer v. United Parcel Service* (2009), 122 Ohio St.3d 104 and the provisions of R.C. 4112.14(C) preclude age discrimination claims under Chapter 4112 where the employee has available to him the opportunity to arbitrate the discharge or where a discharge has been arbitrated and found to be for just cause.

{¶15} Appellant now appeals, assigning as error:

{¶16} "I. JUDGE ERRED IN DISMISSING ORC 4112.02 AGE DISCRIMINATION CLAIM PURSUANT TO ORC 4112.14 AND MEYER V. UPS CASE

(PAGE 1 OF JUDGMENT ENTRY & ORDER DATED JUNE 3, 2010, JUDGE BRANSTOOL).

{¶17} "II. JUDGE ERRED IN DISMISSING PROMISSORY ESTOPPEL CLAIM (PAGE 3 OF JUDGMENT ENTRY DATED MAY 1, 2009, JUDGE SPAHR)."

I.

{¶18} In the first assignment of error, Appellant maintains the trial court erred in granting summary judgment in favor of Appellee on Appellant's age discrimination claim. We disagree.

{¶19} 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, 506 N.E.2d 212. As such, we must refer to Civ.R. 56(C) which provides, in pertinent part:

{¶20} "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 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."

{¶21} Pursuant to the above rule, a trial court may not enter 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, 674 N.E.2d 1164, citing *Dresher v. Burt,* 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264.

{¶22} Revised Code Section 4112.14 governs the issue presented, and reads:

{¶23} "(A) No employer shall discriminate in any job opening against any applicant or discharge without just cause any employee aged forty or older who is physically able to perform the duties and otherwise meets the established requirements of the job and laws pertaining to the relationship between employer and employee.

{¶24} "(B) Any person aged forty or older who is discriminated against in any job opening or discharged without just cause by an employer in violation of division (A) of this section may institute a civil action against the employer in a court of competent jurisdiction. If the court finds that an employer has discriminated on the basis of age, the court shall order an appropriate remedy which shall include reimbursement to the applicant or employee for the costs, including reasonable attorney's fees, of the action, or to reinstate the employee in the employee's former position with compensation for

lost wages and any lost fringe benefits from the date of the illegal discharge and to reimburse the employee for the costs, including reasonable attorney's fees, of the action. The remedies available under this section are coexistent with remedies available pursuant to sections 4112.01 to 4112.11 of the Revised Code; except that any person instituting a civil action under this section is, with respect to the practices complained of, thereby barred from instituting a civil action under division (N) of section 4112.02 of the Revised Code or from filing a charge with the Ohio civil rights commission under section 4112.05 of the Revised Code.

{¶25} "(C) The cause of action described in division (B) of this section and any remedies available pursuant to sections 4112.01 to 4112.11 of the Revised Code shall not be available in the case of discharges where the employee has available to the employee the opportunity to arbitrate the discharge or where a discharge has been arbitrated and has been found to be for just cause."

{¶26} In *Meyer v. United Parcel Service* (2009), 122 Ohio St.3d 104, 2009-Ohio-2463, the Ohio Supreme Court held a former employee's challenge of his discharge in a grievance procedure established by the employer was the functional equivalent of arbitration under R.C. 4112.14(C):

{¶27} "Our holding earlier in this opinion that an age-discrimination claim brought pursuant to R.C. 4112.99 is subject to the substantive provisions of R.C. 4112.02 and 4112.14 establishes that R.C. 4112.14(C) must apply to Meyer's age-discrimination claim. Although *Bellian* and the *Cosgrove* concurrence analyzed R.C. Chapter 4112 principally with regard to statute-of-limitations issues, the reasoning expressed in those

opinions also encompasses other age-discrimination provisions of the chapter beyond statute-of-limitations considerations.

{¶28} "Even though *Hopkins* interpreted a different version of the statute, it does not follow that R.C. 4112.14(C) does not apply here. Pursuant to our cases discussed above, the statute applies even though Meyer's age-discrimination claim is brought pursuant to R.C. 4112.99. The age-discrimination claim undoubtedly falls within the ambit of R.C. 4112.14(C) as a "cause of action described in division (B) of" R.C. 4112.14. As noted in *Dworning v. Euclid,* 119 Ohio St.3d 83, 2008-Ohio-3318, 892 N.E.2d 420, ¶ 41, the General Assembly has, through R.C. 4112.14(C), expressed the intent regarding age-discrimination claims 'to prefer arbitration over other remedies when arbitration is available.'

{¶29} "We hold that pursuant to R.C. 4112.14(C), when the discharge of an employee has been arbitrated and the discharge has been found to be for just cause, the discharged employee is barred from pursuing an action for age discrimination. We conclude that R.C. 4112.14(C) applies to bar Meyer's age-discrimination claim, because his discharge was arbitrated and was found to be for just cause. We therefore reverse the judgment of the court of appeals on the dispositive issue."

{¶30} Based upon *Meyer* and pursuant to R.C. 4112.14(C), which we find specifically applies to causes of action described in division (B) of R.C. 4112.14, and, vis a vis, R.C. 4112.02, we find the trial court did not err in granting summary judgment in Appellee's favor. Appellant's challenge of his discharge in the Step Four grievance procedure set forth in the Collective Bargaining Agreement between Appellee and the local union was the functional equivalent of arbitration under R.C. 4112.14(C).

{¶31} Appellant's first assignment of error is overruled.

II.

{¶32} In the second assignment of error, Appellant maintains the trial court erred in granting summary judgment in favor of Appellee on his estoppel claim.

{¶33} A prima facie case for equitable estoppel requires a plaintiff to prove four elements: (1) that the defendant made a factual misrepresentation; (2) that it is misleading; (3) induces actual reliance which is reasonable and in good faith; and (4) which causes detriment to the relying party. *First Fed. S. & L. Assn. v. Perry's Landing, Inc.* (1983), 11 Ohio App.3d 135, at 145, 11 OBR 215, at 227, 463 N.E.2d 636, at 648. In assessing these four elements in the context of a particular case, relevant factors include:

{¶34} " * * * [(a)] the nature of the representation; (b) whether the representation was in fact misleading; (c) the relative knowledge and experience of the parties; (d) whether the representation was made with the intent that it be relied upon; and (e) the reasonableness and good faith of the reliance, given all the facts and circumstances." *Id; Doe v. Blue Cross/Blue Shield of Ohio* (1992), 79 Ohio App.3d 369.

{¶35} The Collective Bargaining Agreement between Kaiser Aluminum and the United Steelworkers Local 341, dated July 1, 2005, states:

{¶36} "Article 11- Management

{¶37} "The Management of the works and plant and the direction of the working forces, including the right to hire, suspend or discharge for proper cause or transfer, and the right to relieve employees from duty because of lack of work, or for other legitimate reasons is vested exclusively in the Company, provided that this will not be used for

purposes of discrimination against any employee for Union activity. The Company in the exercise of its rights shall observe the provisions of this Agreement."

{¶38} Appellee's Drug and Alcohol Policy states, "[e]mployees who incur on-the-job injuries resulting in medical treatment (MT), restricted work (RWC), or lost workday (LWD) will be screened for drug and/or alcohol use."

{¶39} Appellant admits he received a copy of the policy during his employment with Appellee. However, Appellant claims he was of the impression the company "may" require said testing, and on the date of his injury he did not understand he needed to have said tests.

{¶40} As set forth in the record and the statement of the facts and case, *supra*, Dantzer contacted Appellant shortly after the accident and told him of the requirement, informing him he could have the tests done at either Good Samaritan or Licking Memorial hospitals. Even if appellant believed testing was discretionary, once requested, Appellants refusal no longer can be justified. His "reliance" on the alleged training misrepresentation is superseded by Dantzer's direct request to submit to testing.

{¶41} Accordingly, the evidence does not demonstrate Appellant reasonably relied on any alleged misrepresentations of appellee in good faith. Accordingly, the trial court did not err in granting summary judgment in favor of Appellee on the estoppel claim.

{¶42} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Wise, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ John W. Wise
HON. JOHN W. WISE

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

JAMES TATMAN	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
KAISER ALUMINUM CORP.	:	
	:	
Defendant-Appellee	:	Case No. 10-CA-66

For the reasons stated in our accompanying Opinion, the judgment of the Licking County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ John W. Wise
HON. JOHN W. WISE