

[Cite as *Felger v. Tubetech, Inc.*, 2002-Ohio-1161.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

COLLEEN L. FELGER, et al.,)	
)	CASE NO. 2000 CO 23
PLAINTIFFS-APPELLANTS,)	
)	
- VS -)	<u>OPINION</u>
)	
TUBETECH, INC., et al.,)	
)	
DEFENDANTS-APPELLEES.)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Columbiana County, Common Pleas Court, Case No. 99 CV 07.
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JUDGMENT:	Reversed and Remanded.
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APPEARANCES:

For Plaintiffs-Appellants:	Attorney Thomas A. Hampton P.O. Box 310 160 E. Main Street Barnesville, OH 43713
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For Defendants-Appellees:	Attorney Richard Horning Horning & Horning 245 N. Ellsworth Avenue Salem, OH 44460 Attorney Charles R. Both Yablonski, Both & Edelman 1140 Connecticut Ave., N.W. Suite 800
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Washington, DC 20036

JUDGES:

Hon. Gene Donofrio

Hon. Cheryl L. Waite

Hon. Mary DeGenaro

Dated: March 15, 2002

[Cite as *Felger v. Tubetech, Inc.*, 2002-Ohio-1161.]
DeGenaro, J.

{¶1} This appeal comes for consideration upon the record of the trial court and the parties' briefs. Appellant Colleen Felger (hereinafter "Ms. Felger") timely appeals the judgment of the Columbiana County Court of Common Pleas granting summary judgment in favor of Appellee Tubetech, Inc. (hereinafter "Tubetech"). As the trial court erred in granting partial summary judgment on two counts of Ms. Felger's complaint, we reverse the decision of the trial court and remand this matter for further proceedings.

{¶2} Ms. Felger had been employed by Tubetech since 1988 and had acted as union president during this time. On April 21, 1994 Ms. Felger was injured on the job resulting in her filing a workers' compensation claim. Thereafter, Ms. Felger went through rehabilitation and was later re-employed by Tubetech. She returned to work in a light-duty position with an eye towards regaining her former job. However, on November 7, 1995, Tubetech discharged Ms. Felger after she allegedly made repeated allusions to violence and threatened to injure both the company president and her co-workers.

{¶3} Ms. Felger filed a grievance on November 10, 1995 alleging her discharge was without just cause in a violation of the collective bargaining agreement. As her remedy, Ms. Felger requested reinstatement and back pay, contending the discharge was in fact due to a pattern of company sanctioned discrimination and harassment arising from both her worker's compensation claim and performance of union business. Ms. Felger's claim was brought to arbitration by her union on February 27, 1996 where it was decided Tubetech had discharged Ms. Felger for just cause, specifically finding that she was not fired discriminatorily or retaliatorily.

{¶4} On May 6, 1996, Ms. Felger apparently filed a state-law

complaint based on her claim that she was fired in retaliation for pursuing her rights under the workers' compensation laws. In November of that year, she voluntarily withdrew the complaint.

Subsequently, Ms. Felger filed a complaint in the United States District Court for the Northern District of Ohio. In that action, the district court granted motions for partial summary judgment for Tubetech as to federal claims of employment discrimination based on sex and disability, and retaliation claims stemming from these. On July 30, 1998, the district court dismissed the remaining supplemental state law claims without prejudice.

{¶5} Ms. Felger then filed a seven count complaint in state court on January 7, 1999, which alleged she was subjected to: 1) sex discrimination due to a hostile work environment; 2) retaliatory actions by her employer because she raised/reported the alleged sex discrimination; 3) handicap discrimination on the part of her employer because it failed to reasonably accommodate her alleged disability; 4) retaliatory actions by her employer because she raised a disability claim; 5) retaliation on the part of her employer for filing a workers' compensation claim and pursuing her rights under the workers' compensation system; and, 6) intentional infliction of emotional distress, which claim appears to arise out of all of the above allegations. Finally, Ms. Felger's husband alleged a loss of consortium claim stemming from the above allegations.

{¶6} Ms. Felger filed a motion for partial summary judgment in the state court matter. In the meantime, the United States Court of Appeals for the Sixth Circuit reversed the District Court's ruling in part. The Sixth Circuit found the District Court used the wrong standard to grant summary judgment to

Tubetech because of certain new law arising in the district. Thus, it remanded Ms. Felger's sex discrimination claims back to the District Court. It affirmed, however, the decision in favor of Tubetech as to Ms. Felger's federal disability claims.

{¶7} In the state court action, the trial court granted Tubetech summary judgment with regard to Ms. Felger's sex discrimination retaliation claim and her disability discrimination claim. Thus, claims regarding the underlying issue of sex discrimination, her disability retaliation claim, her intentional infliction of emotional distress claim and her husband's derivative loss of consortium claim remain pending for trial in the common pleas court. It should be noted that the trial court's order as to the above reflects that Tubetech apparently withdrew its request for summary judgment on the sexual discrimination retaliatory claim. The trial court, however, granted summary judgment on that issue after Tubetech tried to withdraw its request. In a later series of filings, where Ms. Felger seeks to have the trial court correct and/or clarify its entry, the trial court leaves the substance of this order intact but declares that there is no just reason for delay and, later, that it is a final and appealable order.

{¶8} Before addressing Ms. Felger's assignments of error, we must first consider whether the order appealed from is a final appealable order. If not, this court lacks jurisdiction to consider the merits of the assigned errors and must dismiss the appeal.

{¶9} The Supreme Court of Ohio has set forth a two pronged analysis appellate courts should apply when considering whether an order constitutes a final appealable order under Civ.R. 54. See

Wisintainer v. Elcen Power Strut Co. (1993), 67 Ohio St.3d 352. We must determine 1) whether the order constitutes a final order as defined by R.C. 2505.02, and 2) whether the trial court's designation that "there is no just cause for delay" was appropriate. *Id.* at 354.

{¶10} As such, we will first address whether the order appealed from in this case conforms with R.C. 2505.02:

{¶11} "(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

{¶12} An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

{¶13} An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

{¶14} An order that vacates or sets aside a judgment or grants a new trial;

{¶15} An order that grants or denies a provisional remedy and to which both of the following apply:

{¶16} The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

{¶17} The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

{¶18} An order that determines that an action may or may not be maintained as a class action.

{¶19} Clearly, subsections 2-5 cannot apply. Accordingly, we

must decide whether this partial summary judgment order affects a substantial right which effectively determines the outcome of the action and prevents the adverse party from obtaining a judgment on the issue or issues.

{¶20} R.C. 2505.02 (A) (1) defines a substantial right as one, “* * * that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.” Turning to the claims decided in the subject partial summary judgment, it can certainly be concluded that Ms. Felger's claims sounding in retaliation for raising sex discrimination complaints, her handicap or disability claims and her workers' compensation retaliation claims are all covered by this definition and must all be considered to be substantial rights. We must now determine whether the unfavorable disposition of these claims in effect determines their outcome and prevents Ms. Felger from obtaining a judgment upon them.

{¶21} As the Supreme Court has stated, “A final order either disposes of the whole case or some separate and distinct branch thereof.” *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94, citing *Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303, 306. In the present case, the order from which Ms. Felger appeals disposed of four separate and distinct claims via summary judgment. As Ms. Felger is precluded from litigating any aspect of those claims due to the nature of their dismissal, the judgment summarily dismissing these claims is a final order.

{¶22} Our analysis, however, does not end here. We must now turn to the trial court's determination that there is “no just reason for delay.” “[T]he phrase 'no reason for delay' is not a mystical incantation which transforms a nonfinal order into a

final appealable order." *Wisintainer*, 67 Ohio St.3d at 354, 617 N.E.2d 1136. "Such language can, however, through Civ.R. 54(B), transform a final order into a final appealable order." *Id.*

{¶23} In deciding that there is no just reason for delay:

{¶24} "the trial judge makes what is essentially a factual determination--whether an interlocutory appeal is consistent with the interests of sound judicial administration, i.e., whether it leads to judicial economy." *Id.*

{¶25} The Supreme Court indicated that appellate review of these determinations should be deferential, stating:

{¶26} "In making its factual determination that the interest of sound judicial administration is best served by allowing an immediate appeal, the trial court is entitled to the same presumption of correctness that it is accorded regarding other factual findings. An appellate court should not substitute its judgment for that of the trial court where some competent and credible evidence supports the trial court's factual findings. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77." (Parallel citations omitted.) *Wisintainer* at 355.

{¶27} Therefore, a trial court's decision to include the language of Civ.R. 54(B) in its order will be upheld if some competent credible evidence supports the trial court's factual findings. *Id.* at 355, 617 N.E.2d 1136, following *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 461 N.E.2d 1273. The reasoning behind this highly deferential standard is that:

{¶28} "The trial court is most capable of ascertaining whether not granting a final order might result in the case being tried twice. The trial court has seen the development of the case, is familiar with much of the evidence, is most familiar with the trial

court calendar, and can best determine any likely detrimental effect of piecemeal litigation." *Wisintainer* at 355, 617 N.E.2d 1136.

{¶29} As to whether the trial court's determination of "no just reason for delay" could serve the interest of judicial economy, *Wisintainer* again provides guidance. In *Wisintainer*, the Supreme Court found that an immediate appeal of an entry of summary judgment in favor of some, but not all, defendants was the "only possible way to achieve the most efficient and straightforward trial, one with all the parties present with an ability to present evidence against each other." *Id.* at 356, 617 N.E.2d 1136. The Court determined that if appeal of the summary judgment order was foreclosed until after trial of the claims against the remaining defendants, there was a possibility that the case would be tried twice. *Id.*

{¶30} In the present case, there were three claims made by Ms. Felger regarding retaliatory action taken by her employer. However, only two of these claims were dismissed by way of the trial court's grant of partial summary judgment. In its order, the trial court implicitly, but necessarily, determined with respect to her sex discrimination retaliation claim and her workers compensation retaliation claim that Tubetech presented a legitimate non-retaliatory reason for discharging Ms. Felger. This same issue will again be addressed in the context of her disability retaliation claim. Ms. Felger is therefore bound by the trial court's original resolution of that issue.

{¶31} If the partial summary judgment were reversed on appeal, all of the issues could be included in a trial of the entire dispute. If this court were to uphold the entry of summary

judgment, the parties would proceed to trial knowing that they were trying only those issues actually in dispute. Otherwise, if Ms. Felger had to wait until after the trial on the other issues to appeal the entry of summary judgment against her, this court might hold that summary judgment was improvidently granted. The entire trial might have to be conducted again due to the similar elements of the claims dismissed and of those pending. Therefore, we find the trial court could have reasonably determined that "the avoidance of piecemeal trials" was more important in this case than "the avoidance of piecemeal appeals." See *Wisintainer*.

{¶32} Consequently, the trial court did not abuse its discretion in making its factual determination that there was no just reason for delay. Accordingly, we will proceed to address this case on its merits.

As her first assignment of error, Ms. Felger alleges:

{¶33} "The trial court erred in granting appellees' motion for summary judgment as to appellants' retaliation claim based upon her opposition to and complaints regarding sex discrimination as alleged in count two of the complaint."

{¶34} Both parties agree, as a result of the decision of the United States Court of Appeals for the Sixth Circuit, summary judgment should not have been granted as to Count Two, retaliation for sexual discrimination on the grounds of *res judicata*. As demonstrated by the language dismissing Count Two, the trial court based its decision to grant Tubetech's motion for summary judgment solely on the grounds of *res judicata*. In light of the Circuit Court's reversal and remand, the federal claims have yet to be litigated. Thus, the doctrine of collateral estoppel no longer applies. As summary judgment on Count Two is improper, Felger's

assignment of error is meritorious.

For her second assignment of error, Ms. Felger asserts the following:

{¶35} "The trial court erred in granting appellees' motion for summary judgment as to appellants' retaliation claim based on her filing and prosecution of worker's compensation claims, as alleged in count five of the complaint."

{¶36} When reviewing a trial court's granting of summary judgment, we review the evidence *de novo*, and apply the same standard used by the trial court. *Varisco v. Varisco* (1993), 91 Ohio App.3d 542, 543, citing *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829; *Bell v. Horton* (1996), 113 Ohio App.3d 363, 365. In addition, summary judgment under Civ.R. 56 is only proper when the movant demonstrates that:

{¶37} "(1) No genuine issue as to any material fact remains to be litigated;

{¶38} "(2) the moving party is entitled to judgment as a matter of law; and

{¶39} "(3) it appears from the evidence that reasonable minds could come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Welco Industries, Inc. v. Applied Cos.* (1993), 67 Ohio St.3d 344, 346.

{¶40} These factors make it clear that summary judgment should be granted with caution, being careful to resolve doubts in favor of the nonmoving party. *Id.*

{¶41} The party seeking summary judgment has the initial burden of informing the court of the motion's basis and identifying those portions of the record showing that there are no

genuine issues of material fact on the essential elements of the nonmoving party's claim. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The movant must be able to point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support its claim. *Id.* If this initial burden is met, the nonmoving party has a reciprocal burden to, "* * * set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not respond, summary judgment, if appropriate, shall be granted." *Id.*

{¶42} The trial court found in its judgment entry that collateral estoppel bars Count Five of Ms. Felger's complaint, worker' compensation retaliation. The trial court reasoned, "the Plaintiff raised those issues in the arbitration and therefore asked for them to be decided by the arbitrator." In support of this finding, the trial court refers to the holding in *Hapgood v. City of Warren* (Oct. 25, 1996), Trumbull App. No. 95-T-5355, unreported. See also *Hapgood v. City of Warren* (C.A.6, 1997), 127 F.3d 490.

{¶43} In *Hapgood*, an employee was dismissed for falsification of records and gross neglect of duty after filing workers' compensation claims. The discharged employee filed a grievance claiming under the collective bargaining agreement he was discharged without just cause. The matter was submitted to binding arbitration and after hearing testimony and briefs, the arbitrator overruled the grievance and found that the employee had falsified his workers compensation and was discharged with just cause.

{¶44} After unsuccessfully pursuing his claim with the OCRC and EEOC, the employee filed a complaint in Common Pleas Court

alleging 1) retaliatory discharge based on pursuit of workers compensation claims, and; 2) tortious conduct. The trial court in *Hapgood* granted summary judgment in favor of the employer. The Eleventh District opined:

{¶45} "After reviewing the record, we determine that the doctrine of collateral estoppel is applicable to appellant's retaliatory discharge claim. Appellant has also failed to argue exactly how the issues in the instant action are different from those in the previous proceedings. We believe that the issues and facts concerning the falsified workers' compensation are sufficiently intertwined with the issues and facts which would have to be determined under R.C. 4123.90 action to require the application of the doctrine." *Id.* at 10, 11.

{¶46} The *Hapgood* court further explained that it was aware of the decision in *Traux v. EM Industries, Inc.* (1995), 107 Ohio App.3d 210 where the First District held that an arbitrator's finding of just cause for the termination of an employee does not preclude that employee from bringing a subsequent suit under R.C. 4123.90. *Id.* at 218. The *Hapgood* court distinguishes its holding from *Truax* stating,

{¶47} "[t]he *Truax* court relied on the reasoning articulated by the Supreme Court of the United States in *Alexander v. Gardner-Denver Co.* (1974), 415 U.S. 36 stating that 'the *Gardner-Denver* line of cases indicates that the issues decided in the arbitration involving a grievance under a collective bargaining agreement and a statutory claim for retaliatory discharge are not the same.' 107 Ohio App.3d at 217. However, an additional cogent factor in the instant case is that the arbitration proceeding and the retaliatory discharge action involve the same subject matter, *i.e.*, the falsified workers' compensation application, and, therefore, both proceedings necessarily involve the same issues." *Id.* at 11,12.

{¶48} The court then determined the issues involved in that particular case were "essentially the same, i.e., the reason for appellant's discharge, even though appellant has attempted to characterize the issue under a different claim and asserting that his discharge was for another reason." The court goes on to explain, "[t]he evidence supports the conclusion that appellant was fired because of filing a false workers' compensation claim, not because of the filing of the claim in and of itself." *Id.* at 11.

{¶49} The *Hapgood* court, however, has applied what appears to be faulty logic in its decision. It distinguishes its facts from those of the United States Supreme Court line of cases and those of *Truax* by asserting that the issues to be litigated in each forum were essentially the same. However, logic dictates when an employee complains of being wrongfully discharged, the reason for discharge will be at issue. This will always be the case. Therefore, the application of the *Hapgood* ruling should be limited to its facts. If *Hapgood* were applied in every case, the results would be wholly inconsistent with the reasoning of the United States Supreme Court.

{¶50} In *Alexander v. Gardner-Denver Co.* (1974), 415 U.S. 36 a minority employee complained of being discharged based upon his race. His case was brought before an arbitrator who found that he was discharged for just cause because he was producing too many defective or unusable parts that had to be scrapped. The union presented evidence on behalf of the employee demonstrating how Caucasian employees with similar production records had not been fired. The arbitrator, however, disregarded those statistics and limited his review to the discharged employee's performance. It

appears the arbitrator found the discharge of the minority employee to be proper in a vacuum, irrespective of the lower standards maintained for Caucasian employees.

{¶51} In *Gardner-Denver*, the statutory claim of racial discrimination and the contractual claim of discharge without just cause involved the same issue; i.e. the reason for the employee's discharge. Regardless of that fact, the United States Supreme Court found:

{¶52} "In submitting his grievance to arbitration, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence." *Id.* at 49, 50.

{¶53} The Court added,

{¶54} "a contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent origins and are equally available to the aggrieved employee." *Id.* at 52.

{¶55} Finally, the court explained:

{¶56} "An arbitrator is confined to interpretation of and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. * * * If an arbitral decision is based 'solely upon the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective bargaining agreement, the arbitrator has authority to resolve only questions of contractual rights * * * ." *Id.* at 54.

{¶57} The First District relied upon this very reasoning in *Thomas v. Gen. Elec. Co.*, (1999), 131 Ohio App.3d 825, as the

basis for concluding a union cannot prospectively waive the individual right of a member to select a judicial forum for the resolution of a member's federal and state statutory claims. In reference to the *Truax* and *Gardner-Denver* decisions, the First District states,

{¶58} "We see strong policy reasons in favor of this holding. Labor arbitrators are authorized under a collective bargaining agreement to resolve contractual claims, not statutory claims. Labor arbitrators have developed a body of expertise in labor law. This is why law presumes the arbitrability of disputes based upon a collective bargaining agreement. (citation omitted) This is *not*, however, the same body of expertise or the same body of law implicated by the civil-rights statutes. Nor are the remedies the same." *Id.* at 82.

{¶59} The Ohio Supreme Court addressed a similar issue in *Youghiogheny & Ohio Coal Company v. Oszust* (1986), 23 Ohio St.3d 39, holding a private arbitrator's determination upholding an employee's discharge for "just cause" pursuant to the collective bargaining agreement did not preclude the Ohio Bureau of Employment Services from concluding the employee was not "discharged for just cause in connection with his work." *Id.* at syllabus. The court reasoned that if it were to accept the argument that "just cause" within the context of the collective bargaining agreement was identical in meaning to the term "just cause" for purposes of eligibility for unemployment compensation, then "the arbitrator would for all practical purposes determine not only the validity of the discharge but also eligibility for unemployment compensation." *Id.* at 41.

{¶60} Likewise, by determining that an arbitrator's decision will be binding on all other tribunals, we would be placing the power of a judge into the hands of an arbitrator. The United

States Supreme Court and the Ohio Supreme Court have unequivocally held the duty of an arbitrator is limited to assessing contractual rights under a collective bargaining agreement. Thus, the determination as to whether or not Ms. Felger was retaliated against for filing a workers' compensation claim would be outside the scope of the arbitrators duties. Accordingly, Felger's second assignment of error is meritorious.

{¶61} For the foregoing reasons, we reverse the trial court's judgment and remand the matter for further proceedings according to law and consistent with this court's opinion.

{¶62} Donofrio, J., concurs.

{¶63} Waite, J., dissents. See dissenting opinion.

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WAITE, J., dissenting.

{¶64} I disagree with the majority opinion here primarily because I do not believe we are yet presented with a final appealable order. This being the case, we have no jurisdiction to take and hear this matter and I would remand it back to the trial court explicitly for action on all pending matters and implicitly for its review of the interlocutory decisions I believe it has so far entered.

{¶65} Before we may address the merits of this appeal, we must address the jurisdictional issue. If, as the trial court ultimately declares, the partial summary judgment entry is a final, appealable order, this Court has jurisdiction to decide the matter. However, if the reverse is true, we lack jurisdiction and the matter must be sent back to the trial court for a complete resolution of all issues before it may be appealed.

{¶66} It is clear that there is no magic to the simple inclusion of the words, "no just reason for delay," into an entry.

In order for our jurisdiction to vest, an order must conform to the requirements of both R.C. §2505.02 and Civ.R. 54(B). *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86. While the order before us certainly contains the Civ.R. 54(B) language, more problematic in this multiple-issue case is whether

the order appealed conforms with R.C. §2505.02(B):

{¶67} "(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

{¶68} "(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

{¶69} "(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

{¶70} "(3) An order that vacates or sets aside a judgment or grants a new trial;

{¶71} "(4) An order that grants or denies a provisional remedy and to which both of the following apply:

{¶72} "(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

{¶73} "(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

{¶74} "(5) An order that determines that an action may or may not be maintained as a class action."

{¶75} Clearly, subsections 2-5 cannot apply. We must decide then, if this partial summary judgment order

affects a substantial right which effectively determines the outcome of the action and prevents the adverse party from obtaining a judgment on the issue or issues.

{¶76} R.C. §2505.02(A)(1) defines a "substantial right" as one, "...that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." When we turn to the claims decided in partial summary judgment, it can certainly be determined that Appellant's claims sounding in retaliation for raising sex discrimination complaints, her handicap or disability claims and her workers' compensation retaliation claims are all covered by this definition and must all be determined to be substantial rights. Our review cannot end here, however, for we must still determine whether the unfavorable disposition of these issues in effect determines their outcome and prevents Appellant from obtaining a judgment as to these issues. Because of their very nature, I would hold that this question must be answered in the negative and we must determine that this order is not yet ripe for appeal.

{¶77} While dealing with another issue not present before us, the Ohio Supreme Court in *Denham v. New Carlisle* (1999), 86 Ohio St.3d 594, decided that in certain, select instances, summary

judgment orders which, as a rule, are otherwise considered interlocutory when they only resolve partial claims or some of the parties' interests, may sometimes be final and appealable. The Court reinforced the notion that the requirements of both Civ.R. 54 and R.C. §2505.02(B) must be met. Further, the Court reiterates that all applicable portions of 2505.02(B) must be met; that is, the right involved must be both substantial and completely resolved by the summary judgment. While statutory definition provides us with a guide to determining just what constitutes a substantial right, neither the statute nor the Court gives us guidance as to how we are to resolve whether a particular decision effectively determines the matter and prevents judgment for the complaining party. In *Denham*, one of multiple parties to an action was dismissed entirely in summary judgment and the plaintiff voluntarily dismissed the remaining parties, seeking review of the matter. The Supreme Court stated that, as the only remaining party defendant to the lawsuit was dismissed in summary judgment, it was relatively easy to detect that the summary judgment both affected a substantial right and completely determined the matter.

{¶78} In *Chef Italiano*, *supra*, the Court was faced with circumstances similar to that presently at bar. The corporation

was suing both multiple parties and for multiple claims. Ultimately, the Court ruled that when the partial summary judgment completely disposed of certain of the multiple claims, these claims were final and appealable. Without explicitly saying so, the Court also ruled that for any claim where there may be a body of interest with matters remaining before the trial court, the issues were not final and appealable despite the inclusion of the language mandated by Civ.R. 54(B).

{¶79} The *Chef Italiano* decision must be applied with caution, because only two judges ultimately concurred in both judgment and opinion. Two others concurred in the syllabus and judgment (that requirements of both Civ.R. 54(B) and R.C. §2505.02(B) must be met for an order to be considered final and appealable). One judge concurred only with judgment, as did yet another, who filed his own opinion expressly stating wholly separate reasons for concurring in judgment.

{¶80} This Court has previously ruled on the issue to a certain degree. In *Walkosky v. Valley Memorials* (Sept. 27, 2001), Jefferson App. No. 00-JE-39, unreported, this Court pointed out that subsequent to *Chef Italiano*, Civ.R. 54(B) was amended to better address the issue of multiple claims arising out of the same transaction. Relying in part on *Hitchings v. Weese* (1997),

77 Ohio St.3d 390, and without much discussion, we allowed an appeal of the decision to grant partial summary judgment. In looking at *Walkosky*, where the trial court granted defense motions for summary judgment on plaintiff's claims of negligent and intentional infliction of emotional distress but left for trial a claim regarding invasion of privacy, it can be gleaned that the claims determined in summary judgment had no "body of interest" with a claim for invasion of privacy. That is, the elements necessary to prove the dismissed claims, and thus the facts which must underlie them, were wholly separate and distinct from those which must be pled and proven for an invasion of privacy claim. Of course, as these were multiple claims arising out of the same incident or transaction, there will always be a certain factual overlap. However, any final determination as to the intentional and/or negligent infliction of emotional distress claims in no way hinged on the determination as to the allegations of invasion of privacy. Therefore, the partial summary judgment disposed of claims regarding substantial rights and, in so doing, determined the action as regards those rights with finality, preventing judgment as to those claims.

{¶81} In a like vein, we recently decided in *Regional Imaging Consultants Corp. v. Computer Billing Services* (Nov. 30, 2001),

Mahoning App. No. 00 CA 70, unreported, that partial summary judgment was ripe for appeal pursuant to Civ.R. 54(B) and R.C. §2505.02(B)(1). We determined that one issue decided, dealing with defamation, was completely separate and distinct from remaining claims. Because the adjudicated claim was completely and finally decided, did not depend or rely on any of the remaining claims or their underlying facts for determination, we determined that the defamation claim was finally and completely decided against the plaintiff, preventing him from further judgment regarding these issues. *Computer Billing, infra* at 13, citing to *Curtiss-Wright Corp. v. General Elec. Co.* (1980), 446 U.S. 1, 9, where the court held an issue was severable or separable where no subsequent appeal would need to address or decide the same issue or issues. However, as to other *Regional Imaging* claims filed in a second entry and combined with the earlier appeal, this Court held that there were issues still to be resolved where the claims adjudicated were necessary to those determinations or there was a factual overlap such that final determination was not reached on all surrounding issues.

{¶82} Turning now to the case at bar, I believe the majority has our earlier rules of law turned backward. In looking at this matter, it is apparent that Appellant's claims here are so

overlapped or intertwined that such severability is impossible. The trial court determined counts two, three and five in partial summary judgment, leaving counts one, four, six and seven. Disregarding count seven for purposes of discussion, as it is wholly derivative of Appellant's six other counts, count two was a retaliation claim based on Appellant's perceived sexual discrimination by way of a hostile workplace. Despite the fact that the trial court has ruled that there was no just reason for delay to appeal this issue, it is wholly conceivable that the trial court would revisit it once full trial in count one (her underlying sex discrimination claim) was held. Certainly, if Appellant presents evidence which convinces a trier of fact that such a hostile workplace existed, the retaliation claim gains credence and relevance. Virtually identical evidence will be necessary for both claims, with Appellant further required to prove that when she complained of the alleged discrimination her employer retaliated against her for so doing. As the remaining claim underlies and supports the dismissed claim, these cannot be said to be so separate that Appellant is prevented from prevailing on the underlying issues despite the court's *interlocutory* decision. Further complicating this matter is the fact that Appellee withdrew its request for summary judgment on this issue

and the federal court reinstated Appellant's federal claims. Presumably, the trial court took no action to correct or revisit its partial summary judgment as to this issue awaiting either our decision or that of the federal court, however, it would seem that the interests of justice would best be served by remanding these intertwined issues to the trier of fact.

{¶83} We must remember in dealing with the issue, and it is apparent that the majority here does not take this into consideration, that the general rule is that a partial summary judgment determination is *interlocutory*. Thus, the trial court retains jurisdiction over the matter and is free, at any time prior to full and complete determination of the case, to change its mind on the matter contained within such an order. This has, in fact, happened in other cases and is the reason why a summary judgment determination *against* a party cannot be appealed so long as a full trial on the merits will be held. Thus, I disagree with the majority when it states at page 7 that Ms. Felger is, "...bound by the trial court's original resolution..." of the issues decided in summary judgment. Because these are intertwined with the issues remaining before it, and the decision to date is interlocutory in nature, Ms. Felger is free to attempt to change the trial court's mind on those issues at any time up to the

court's final resolution of all issues.

{¶84} When the trial court granted Appellee summary judgment on the handicap discrimination claim, but kept jurisdiction to hear the issue of alleged retaliation based on this claim, the decision was merely interlocutory. For the reasons stated above, Appellant has not been prevented from having her substantial right in this area adjudicated because she will necessarily be forced to raise evidence dealing with her allegations in one area in order to prove the other. As to the general issue of her disability claims, then, certain of these remain to be determined despite what the majority refers to as the trial court's so-called final action.

{¶85} While it is readily apparent that the earlier claims, whether "decided" or pending, are inextricably entwined, we should determine that Appellant's fifth count, regarding alleged retaliatory actions by her employer for filing a workers' compensation claim or claims, is also not ripe for appeal. The trial court has left pending Appellant's allegations regarding intentional implication of emotional distress. This count is all-inclusive of every allegation Appellant raises against her employer. Thus, while perhaps this *particular* issue is not intended to be directly determined by the trial court, her rights

to show that the combined or cumulative actions by her employer caused her damage remain to be heard. A review of her complaint reveals that while on first blush this cause of action may be seen as severable, her real goal is to seek redress for the alleged combined wrongs of her employer. She may still do so, despite the interlocutory partial summary judgment. Simply because the trial court has ruled against her in one claim of her multiple-claim litigation does not mean that her action has effectively been determined or that she is prevented from judgment. All of her claims seek one common goal - redress for alleged wrongs. All of her claims have substantial overlaps in facts and evidence. All of her claims are united in her catch-all found in count six. Appellant's underlying claims remain to this date largely viable in the trial court. Thus, all of the provisions of R.C. §2505.02(B) are not met despite the invocation of the language mandated by Civ.R. 26(B) and this matter is not yet final and appealable. See *Hitchings v. Weese, infra*, where, in a concurring opinion, Justice Resnick explained that when an underlying claim remains pending in the trial court the matter is not yet ripe for appeal.

{¶86} For all of the foregoing, then, I believe that the majority, in reversing the interlocutory decisions, does so

prematurely and without jurisdiction. I believe we must refuse jurisdiction, return the matter to the trial court and allow it to make a full and final determination as to all of the merits of this matter.