

[Cite as *White v. Cleveland*, 2010-Ohio-4357.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94212

HERSHEL WHITE

PLAINTIFF-APPELLANT

vs.

CITY OF CLEVELAND

DEFENDANT-APPELLEE

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-667908

BEFORE: McMonagle, P.J., Blackmon, J., and Sweeney, J.

RELEASED AND JOURNALIZED: September 16, 2010

ATTORNEY FOR APPELLANT

Paul Mancino, Jr.
75 Public Square, Suite 1016
Cleveland, OH 44113-2098

ATTORNEYS FOR APPELLEE

Robert J. Triozzi
Director of Law
Theodora M. Monegan
Chief Assistant Law Director
Steven J. Moody
Assistant Law Director
City of Cleveland, Department of Law
601 Lakeside Avenue, Room 106
Cleveland, OH 44114-1077

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Plaintiff-appellant, Hershel White, appeals from the trial court's judgments granting the motion for summary judgment of defendant-appellee, the city of Cleveland, and denying White's motion for summary judgment. We reverse and remand.

{¶ 2} White initiated this action for injunctive relief in August 2008, seeking reinstatement to his position with the city. Both parties filed

motions for summary judgment. The trial court summarily granted the city's motion and denied White's motion.

{¶ 3} The record before us demonstrates that in October 2006, White was found guilty of three counts of criminally usurious transactions and sentenced to community control sanctions. The crimes allegedly involved White, a foreperson in the city's division of waste management, engaging in usurious transactions with subordinates.

{¶ 4} In an October 23, 2006 letter from White to the city, White wrote, "I have been found guilty in court of the charges for which I have been recently suspended. I therefore submit my resignation effective immediately."

{¶ 5} In 2007, White's convictions were vacated on appeal. *State v. White*, Cuyahoga App. No. 89085, 2007-Ohio-5951.¹ After his convictions were vacated, White asked the city to reinstate him to his former position, but the city refused.

{¶ 6} One of the grounds upon which the city contended that it was entitled to summary judgment was White's resignation. White contends, however, that his resignation was not voluntary. In particular, he contends that the trial court judge "decreed that [he] would go to prison unless he resigned his position." White contends that given the "Hobson's choice" with

¹This court found the state's evidence insufficient to support the convictions.

which he was presented — resign his position or go to prison — the resignation was not voluntary. We agree.

{¶ 7} Webster's New Collegiate Dictionary (1981) 1303, defines "voluntary," in part, as "unconstrained by interference," and "acting or done of one's free will without valuable consideration or legal obligation." Attached to White's complaint as Exhibit 1 was the sentencing entry from White's criminal case. The entry provides in relevant part that White was to "complete resignation from job with city of Cleveland[.]" Under these circumstances, White's resignation was not voluntary, that is, "unconstrained by interference," or "done of [his] free will without * * * legal obligation."

{¶ 8} We are not persuaded by the city's argument that it had nothing to do with White's resignation because it was the state of Ohio who prosecuted him and the trial court judge who gave him the choice of resigning or going to prison. The city's complaints about White were the impetus for the prosecution, which this court found unsupported by sufficient evidence.

{¶ 9} In light of the above, to the extent that the trial court based granting summary judgment in favor to the city because of White's resignation, it was improper.

{¶ 10} One of the other grounds raised by the city in support of its motion for summary judgment was that White failed to exhaust his administrative remedies. "Failure to exhaust administrative remedies is not

a jurisdictional defect, and such a failure will not justify a collateral attack on an otherwise valid and final judgment; it is an affirmative defense which must be timely asserted in an action or it will be considered waived.” *The Salvation Army v. Blue Cross & Blue Shield of N. Ohio* (1993), 92 Ohio App.3d 571, 577, 636 N.E.2d 399, citing *Gannon v. Perk* (1976), 46 Ohio St.2d 301, 309-310, 348 N.E.2d 342. Generally, an affirmative defense is deemed waived if it is not asserted by way of an answer or amended answer. See Civ.R. 8(C); see, also, *Mossa v. W. Credit Union, Inc.* (1992), 84 Ohio App.3d 177, 180-181, 616 N.E.2d 571; *Jazwa v. Alesci* (Sept. 12, 1996), Cuyahoga App. No. 69857.

{¶ 11} The city asserted 14 affirmative defenses in its answer, none of which were the failure to exhaust administrative remedies. Thus, the city waived that affirmative defense because it was not timely raised, and to the extent that the trial court granted the city’s summary judgment motion on the ground of failure to exhaust administrative remedies, it was improper.

{¶ 12} The city’s final ground for summary judgment was White’s failure to request reinstatement within one year from his resignation under Ohio Adm. Code 123:1-25-02. That section provides that “[a]n employee in the classified service, who resigns, having served the required probationary period, may be reinstated upon request of the appointing authority to the

director to the same or similar position in the agency, at any time within one year from the date of such resignation.”

{¶ 13} White resigned his position in a letter dated October 23, 2006, and requested reinstatement in a letter dated May 5, 2008. He contends that the one-year time limit under Ohio Adm. Code 123:1-25-02 does not apply here because the time was tolled during the appellate process.² As already discussed, White’s resignation was not voluntary and, thus, the provisions of the Ohio Adm. Code did not apply. To the extent therefore that the trial court based its judgment on that provision, it was improper.

{¶ 14} In light of the above, the trial court erred by granting summary judgment in favor of the city and denying White’s motion for summary judgment.

Judgment reversed and remanded.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

²The Ohio Supreme Court declined to accept the state’s appeal on April 23, 2008. *State v. White*, 117 Ohio St.3d 1477, 2008-Ohio-1841, 884 N.E.2d 1109.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
JAMES J. SWEENEY, J., CONCUR