

[Cite as *Ayers v. Progressive RSC, Inc.*, 2010-Ohio-4687.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94523

INEZ AYERS

PLAINTIFF-APPELLANT

VS.

PROGRESSIVE RSC, INC.

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-681565

BEFORE: Stewart, J., Rocco, P.J., and Jones, J.

RELEASED AND JOURNALIZED: September 30, 2010

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MELODY J. STEWART, J.:

{¶ 1} Plaintiff-appellant, Inez Ayers, appeals the order of the Cuyahoga County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Progressive RSC, Inc., on Ayers's claim that she was wrongfully terminated for filing a workers' compensation claim. For the reasons stated below, we affirm.

{¶ 2} Ayers began working for Progressive in 1998 as an Administrative Specialist. On March 18, 2008, she notified Progressive that she had injured her knee at work on February 22, 2008 when she slipped and fell while sorting mail. Olivia Whites, a Progressive workers' compensation

adjuster, spoke to Ayers and prepared a First Report of Injury form regarding the incident. Ayers told Whites that she took a step toward the trash can and slipped, falling forward on both knees. She said she did not know what caused her to fall, but confirmed that there were no defects in the floor and no liquids spilled on the floor. She said she had not sought medical treatment for the injury and was not being treated for the pain. According to Whites, Ayers also told her that she had no previous injuries, had never been in an automobile accident, and had filed one prior workers' compensation claim in the 1980's relating to carpal tunnel syndrome.

{¶ 3} By her signature on the form, Ayers certified, "that the above information is true and accurate to the best of my knowledge and belief. I understand that the company may take disciplinary action against me, up to and including termination, if this certification is untrue. I also understand that such disciplinary action may be taken against me should I knowingly furnish the company with false information in the future, in connection with this injury."

{¶ 4} Whites sent Ayers a copy of Progressive's workers' compensation procedural guidelines and a "Knee Questionnaire" with questions relating to the claimed injury. One of the questions asked, "Have you ever been involved in an automobile or motorcycle accident? If yes, describe what body part(s) were injured and when did the accident(s) occur. When is the last

time you treated for any injuries from the accidents?” Ayers responded “No.” Subsequent investigation by Whites disclosed that Ayers had been involved in several automobile accidents in the past and had filed a second, undisclosed workers’ compensation claim in 1986.

{¶ 5} Whites forwarded the claim file to Jacqueline Sperling, a more senior adjuster. Sperling discovered that Ayers was involved in an automobile accident in 2002 in which she suffered an ankle fracture and other injuries resulting in her missing approximately seven weeks of work. Sperling reported her concerns that Ayers might have committed fraud or misconduct with regard to her claim to Ayers’s human resource representative. After reviewing additional medical reports and statements from the two employees Ayers had identified as witnesses to the incident, Sperling concluded that the claimed injury was idiopathic and therefore not compensable through the workers’ compensation program. Sperling informed Ayers on April 15, 2008, that Progressive was denying her claim for benefits.

{¶ 6} Ayers appealed her claim to the Bureau of Workers’ Compensation (“BWC”). In the statement of claim sent to the BWC, Progressive typed “EE [meaning employee] was in the support stating [sic] 2nd floor sorting mail. EE took a step and slipped (unknown cause) and

landed on both knees.” Under this, Ayers handwrote, “not sure if it was a paperclip, tack or water that I slipped on, or new waxed floor.”

{¶ 7} Progressive scheduled Ayers for an independent medical examination (IME) with Dr. Dean Erickson on July 8, 2008. According to company policy, in order to make certain that the IME complies with BWC guidelines and timelines, and to avoid cancellation charges, employees are prohibited from scheduling or rescheduling an IME appointment on their own. IME providers are advised that only authorized Progressive risk management employees may cancel or reschedule an IME. Sperling notified Ayers of the date, time, and location of the IME by letter dated May 29, 2008.

In boldfaced text and underlined, the letter stated that in the event Ayers was unable to attend the exam, she was to notify Sperling at least 48 hours prior to the scheduled time for the exam.

{¶ 8} On July 7, 2008, Ayers called the doctor’s office directly and rescheduled the appointment for a different date and time. She did not notify anyone at Progressive. On July 9, 2008, Whites called the doctor’s office to see if Ayers had attended the IME. Whites said that Kathy Reed, the doctor’s scheduler, was surprised by the call because she thought Whites had called and rescheduled the appointment two days earlier. Reed checked her call log and told Whites that a woman called saying she was “from Progressive” and needed to cancel the appointment for Inez Ayers and

reschedule it for another date. Reed said the caller did not identify herself as Inez Ayers or make any reference that would lead Reed to believe that the caller was Ayers calling to cancel her own appointment. Reed said she was certain the caller did not identify herself as Ayers because she knew that only the employer is permitted to cancel or reschedule an IME appointment. Reed told Whites the caller said, "This is the employer." Reed then wrote "Olivia" on the call log next to the changed date.

{¶ 9} Sperling also contacted Reed who confirmed that someone purporting to be from Progressive called to cancel and reschedule the IME. Sperling took this new information to Joy Pollak, Ayers's human resource department representative. Pollak and her supervisor reviewed the entire file relating to Ayers's claim and determined that Ayers had violated Progressive's code of conduct policy against deceit and was subject to termination. They decided Pollak would give Ayers a chance to explain her conduct before making a decision on termination.

{¶ 10} On July 18, 2008, Pollak met with Ayers and her manager, Brian Funtash. Pollak asked Ayers about the phone call and the scheduler's claim that the caller represented herself as a member of Progressive's risk management department. Ayers did not deny calling the doctor's office. She denied representing herself as a risk management employee and claimed she specifically identified herself by name to the doctor's scheduler. She

claimed she was not aware of the company policy allowing only authorized employees to reschedule the IME. She said she called to reschedule the appointment because she had meetings she felt she had to attend that morning. However, when asked by Pollak, Ayers confirmed that she had received a letter that included the procedure for cancelling or rescheduling the IME. She also admitted that the 9:00 a.m. meeting was a daily meeting that she knew about more than a week in advance and was not critical for her to attend. Pollak terminated Ayers employment effective that day.

{¶ 11} Ayers filed suit against Progressive alleging the company had wrongfully terminated her in retaliation for filing a workers' compensation claim in violation of R.C. 4123.90. Progressive filed a motion for summary judgment arguing that the company terminated Ayers because she violated company policy by making false or inaccurate misrepresentations with regard to her claim for benefits. The trial court granted summary judgment finding that Ayers failed to make out a prima facie case of retaliation and failed to establish that Progressive's nonretaliatory reason for termination was pretextual. Ayers timely appeals raising a single error for review arguing that the trial court erred by entering summary judgment when genuine issues of material fact exist.

{¶ 12} We review the granting of summary judgment under a de novo standard. We afford no deference to the trial court's decision and

independently review the record to determine whether summary judgment is appropriate. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Summary judgment is appropriate if (1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. Civ.R. 56.

{¶ 13} To establish a prima facie case for retaliatory discharge, an employee must prove that he or she, (1) was injured on the job, (2) filed a workers' compensation claim, and (3) was discharged in contravention of R.C. 4123.90. *Markham v. Earle M. Jorgensen Co.* (2000), 138 Ohio App.3d 484, 492, 741 N.E.2d 618. R.C. 4123.90 provides in pertinent part: "No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim * * * 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."

{¶ 14} The scope of R.C. 4123.90 is narrow and protects only against adverse employment actions in direct response to the filing or pursuit of a workers' compensation claim. "R.C. 4123.90 does not prohibit a discharge for just and legitimate termination of employment. It does not suspend the

rights of an employer, nor insulate an employee from an otherwise just and lawful discharge.” *Markham* at 493, quoting *Brown v. Whirlpool Corp.* (Sept. 1, 1987), 3rd Dist. No. 9-86-20.

{¶ 15} “Where an employee raises an inference of a retaliatory discharge, the burden of going forward with evidence shifts to the employer to set forth a legitimate, nonretaliatory reason for the discharge. If the employer sets forth a legitimate, nonretaliatory reason for the employee’s discharge, the employee must establish that the reason given by the employer is pretextual and that the real reason for the discharge was the employee’s protected activity under the Workers’ Compensation Act.” *Id.* at 492 (internal citations omitted). The burden remains at all times on the employee to prove that the employer had a retaliatory motive for the discharge. *Id.* at 492, citing *Bertrand v. Collinwood Serv. Ctr.* (May 16, 1991), Cuyahoga App. No. 58508.

{¶ 16} Ayers argues that Sperling targeted her for retribution for filing the workers’ compensation claim and initiated the process to get her fired. She claims Sperling’s investigation into the claim was “one-sided” and did not give her an opportunity to give her side of the story. Ayers further argues that the trial court improperly weighed the evidence, rather than construing it in her favor. She contends that issues of material fact remain relating to whether she misrepresented herself to the doctor’s scheduler and whether she

misrepresented her prior accident and injury history. She claims she identified herself by name to the doctor's office and merely forgot about the prior accidents because her left knee had not been injured in them.

{¶ 17} Ayers admitted in her deposition that she was aware that providing false or inaccurate information in connection with a claim for benefits could subject her to discipline, including termination. It is undisputed that Ayers neglected to list past automobile accidents and significant past injuries on the company's claim questionnaire she signed. Ayers's own testimony establishes that she had been involved in at least five automobile accidents prior to the claimed injury. It is also undisputed that Ayers called and cancelled the July 8, 2008 IME directly, rather than contacting Sperling as instructed. Thus, even leaving aside the question of whether Ayers' intentionally misrepresented herself as a risk management employee, the evidence establishes that Ayers acted in clear violation of company policy that subjected her to the possibility of termination.

{¶ 18} While the burden of proof in retaliatory discharge shifts back and forth between the employee and employer, the ultimate burden of proof in an action filed under R.C. 4123.90 remains with the employee. *Markham*, 138 Ohio App.3d at 492. Because Ayers failed to sustain her burden to establish a prima facie case of retaliatory discharge and failed to demonstrate that Progressive's stated reason for termination was mere pretext, summary

judgment against Ayers on her wrongful discharge claim was proper.
Appellant's single assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and
LARRY A. JONES, J., CONCUR