[Cite as *McNally v. Cleveland*, 2010-Ohio-512.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92697

THOMAS G. MCNALLY

PLAINTIFF-APPELLANT

vs.

CITY OF CLEVELAND, OHIO, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-653201

BEFORE: Boyle, J., Gallagher, A.J., and Blackmon, J.

RELEASED: February 18, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} The underlying case stems from defendant-appellee's, City of Cleveland's, discharge of plaintiff-appellant, Thomas McNally,[1] for his failure to comply with its residency requirement. Following his termination, McNally filed suit in common pleas court without first appealing to the City's Civil Service Commission. The trial court granted the City's motion for summary judgment, finding inter alia that McNally failed to exhaust his administrative remedies, and from this decision, McNally appeals. For the reasons discussed below, we affirm.

Procedural History and Facts

{¶ 2} In August 2006, McNally accepted a civil service position with the City in its Office of Equal Opportunity. During this time, the City required all of its employees to reside in Cleveland within six months of their date of hire and remain so during their tenure as mandated under Section 74 of the City of Cleveland Charter.

{¶ 3} Prior to his termination, McNally appeared for a hearing before a Civil Service Commission referee on January 18, 2008 and admitted that he had never complied with the City's residency requirement during his two years with the City but intended to comply in the future. McNally stated that he was in the process of signing a lease for an apartment in Cleveland. The City subsequently adopted the

[1]We have corrected the caption of this appeal to reflect the correct spelling of plaintiff's name.

referee's recommendation that McNally be discharged for failing to comply with the City Charter and Civil Service Commission Rule 17.00, et seq. On February 8, 2008, the City notified McNally by letter that it had sustained the referee's recommendation and that his employment was terminated "effective the date of this letter for failure to maintain a bona fide residency in the City of Cleveland." The City further informed McNally that, under Civil Service Rule 17.60, he had ten working days from the date of the letter to file an appeal with the Civil Service Commission regarding his termination.

{¶ 4} Instead of filing an appeal with the Civil Service Commission, McNally subsequently filed suit in common pleas court on March 7, 2008, challenging his termination as being in violation of (1) state law, namely, R.C. 9.481, which prohibited municipalities from requiring their employees, as a condition of employment, to reside in any specific area of the state; (2) his constitutional due process rights; and (3) his right to equal protection.

{¶ 5} The City subsequently moved for summary judgment, arguing (1) that McNally failed to exhaust his administrative remedies, and (2) that R.C. 9.481 was an unconstitutional law, as recognized by all of the appellate courts that had considered its constitutionality, including the Eighth District. Recognizing that the Ohio Supreme Court had accepted jurisdiction regarding the constitutionality of R.C. 9.481, the City further argued that McNally was precluded from taking advantage of the continuing proceedings because he failed to first exhaust his administrative

remedies. McNally opposed the City's motion, countering that R.C. 9.481 was a constitutional law and that the City's residency requirement was unconstitutional because it "makes an invalid distinction between residents and nonresidents," depriving nonresidents of employment merely based on residency. McNally did not address the City's claim that he failed to exhaust his administrative remedies.

{¶ 6} The trial court granted the City's motion for summary judgment. From this decision, McNally appeals, raising two assignments of error. In his first assignment of error, McNally argues that the trial court erred in granting summary judgment because R.C. 9.481 is a constitutional law that prohibits municipalities from enforcing residency requirements. In his second assignment of error, he argues that the enforcement of a residency requirement violates the Ohio and United States constitutions because it arbitrarily distinguishes between residents and nonresidents, depriving him of the right to employment. McNally, however, fails to raise any argument challenging the trial court's finding that he failed to exhaust his administrative remedies.

Standard of Review

{¶ 7} We review an appeal from summary judgment under a de novo standard. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 7, 746 N.E.2d 618, 622. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Northeast Ohio Apartment Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio

App.3d 188, 192, 699 N.E.2d 534, 536. Civ.R. 56(C) provides that before summary judgment may be granted, a court must determine that "(1) no genuine issue as to any material fact remains to be litigated, (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 viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party." *State ex rel. Duganitz v. Ohio Adult Parole Auth.* (1996), 77 Ohio St.3d 190, 191, 672 N.E.2d 654, 656.

{¶ 8} The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264, 273-74. If the movant fails to meet this burden, summary judgment is not appropriate, but if the movant does meet this burden, summary judgment will be appropriate only if the nonmovant fails to establish the existence of a genuine issue of material fact. Id. at 293.

Exhaustion of Administrative Remedies

{¶ 9} "It is a well-established principle of Ohio law that, prior to seeking court action in an administrative matter, the party must exhaust the available avenues of administrative relief through administrative appeal." *Noernberg v. Brook Park* (1980), 63 Ohio St.2d 26, 29, 406 N.E.2d 1095, 1097, citing *State ex rel. Lieux v. Westlake* (1951), 154 Ohio St. 412, 96 N.E.2d 414. If a party fails to exhaust the available administrative remedies first, a trial court may decline to intervene as a

matter of judicial economy. See *Nemazee v. Mt. Sinai Medical Center* (1990), 56 Ohio St.3d 109, 111, 564 N.E.2d 477. Indeed, "[t]he purpose of the doctrine '* * * is to permit an administrative agency to apply its special expertise * * * in developing a factual record without premature judicial intervention.'" Id., citing *Southern Ohio Coal Co. v. Donovan* (C.A.6, 1985), 774 F.2d 696, 702.

{¶ 10} "The failure to exhaust administrative remedies is not a jurisdictional defect but is rather an affirmative defense, if timely asserted and maintained." *Dworning v. Euclid*, 119 Ohio St.3d 83, 2008-Ohio-3318, 892 N.E.2d 420, ¶11, citing *Jones v. Chagrin Falls* (1997), 77 Ohio St.3d 456, 674 N.E.2d 1388, syllabus.

{¶ 11} There are, however, exceptions to the exhaustion doctrine. "[W]hen there is a judicial remedy that is intended to be separate from the administrative remedy, the requirement of exhaustion of administrative remedies does not apply." *Dworning* at ¶10, citing *Basic Distrib. Corp. v. Ohio Dept. of Taxation,* 94 Ohio St.3d 287, 290, 2002-Ohio-794, 762 N.E.2d 979. For example, because the General Assembly has provided a clear private cause of action to remedy discriminatory practices, which is superior to any exhaustion requirement, a public employee is not required to first exhaust the public employer's administrative remedies before pursing the civil action allowed by R.C. Chapter 4112. *Dworning* at ¶1.

{¶ 12} Additionally, a party is not required to pursue administrative relief first when the administrative body lacks the authority to grant the relief sought. See *Gates Mills Invest. Co. v. Pepper Pike* (1978), 59 Ohio App.2d 155, 167, 392 N.E.2d

1316, 1324. Ohio courts recognize that the pursuit of administrative relief under such circumstances would be a "vain act" and therefore do not impose the exhaustion doctrine. Id.; see, also, *Salvation Army v. Blue Cross & Blue Shield of N. Ohio* (1993), 92 Ohio App.3d 571, 636 N.E.2d 399. But the mere fact that a party does not believe he or she will prevail at the administrative level does not render an administrative appeal to be a vain act. Indeed, "[a] vain act is defined in the context of lack of authority to grant administrative relief and not in the sense of lack of probability that the application for administrative relief will be granted." *Gates Mills Invest. Co.* at 167.

{¶ 13} Here, we find neither exception applies and therefore cannot say that the trial court erred in declining to intervene based on McNally's failure to exhaust his administrative remedies. The gravamen of McNally's complaint was that the City should not have terminated his employment based on his failure to comply with the residency requirement. McNally sought reinstatement of his employment. Here, the Civil Service Commission possessed the authority to grant such relief if McNally would have properly appealed. See, generally, *Noernberg*, 63 Ohio St.2d 26 (city's civil service commission best suited to first review indefinite suspension of fire fighter for violating city's residency requirement).

{¶ 14} And although we recognize that the Ohio Supreme Court in *Lima v. State*, 122 Ohio St.3d 155, 2009-Ohio-2597, 909 N.E.2d 616, has since declared R.C. 9.481 to be constitutional, thereby prohibiting municipalities from enforcing

residency requirements upon their employees, we still cannot say that the trial court erroneously applied the exhaustion doctrine. McNally's failure to first exhaust his administrative remedies precludes him from subsequently reaping the benefits of the *Lima* decision. Cf. *Missig v. Cleveland Civ. Serv. Comm.*, 123 Ohio St.3d 239, 2009-Ohio-5256, 915 N.E.2d 642 (employee first filed an appeal with the Civil Service Commission prior to filing appeals with the common pleas court, appellate court, and supreme court).

{¶ 15} Having found that the trial court properly granted summary judgment on the basis that McNally failed to exhaust his administrative remedies, we need not address the other arguments raised relating to the validity of the City's residency requirement.

{¶ 16} McNally's two assignments of error are overruled as moot.

Judgment affirmed.

It is ordered that appellees recover from appellant 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.

MARY J. BOYLE, JUDGE

SEAN C. GALLAGHER, A.J., and
PATRICIA ANN BLACKMON, J., CONCUR