

[Cite as *Tomko v. Cuyahoga Cty. Bd. of Commrs.*, 2011-Ohio-1575.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95725

GUY S. TOMKO

PLAINTIFF-APPELLANT

vs.

CUYAHOGA COUNTY BD. OF COMMISSIONERS

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-705702

BEFORE: Cooney, J., Sweeney, P.J., and Rocco, J.

RELEASED AND JOURNALIZED: March 31, 2011

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Guy S. Tomko (“Tomko”), appeals the trial court’s grant of summary judgment in favor of defendant-appellee, Cuyahoga County Board of County Commissioners (the “County”). We find some merit to the appeal and affirm in part and reverse in part.

{¶ 2} Tomko was employed by the County in the Department of Central Services as a custodial work supervisor. He admits he pled guilty to the felony offense of importuning in the Williams County Common Pleas Court in May 2009. He was charged after soliciting sex from a minor over the

internet. Following his guilty plea, the County placed Tomko on unpaid administrative leave. A predisciplinary conference was held on June 2, 2009, at which Tomko had the opportunity to respond to the allegation that he had been convicted of a felony, which constitutes a removable infraction under the County's Employment Conduct and Discipline Policy. The County subsequently approved an order of removal thus terminating his employment effective June 29, 2009. Following his termination, Tomko requested a cash payment for his accrued unused sick leave time. The County denied the request because County policy allows for payment of unused sick leave only upon retirement.

{¶ 3} Tomko appealed his order of removal to the State Personnel Board of Review ("SPBR"). The SPBR dismissed his appeal for lack of subject matter jurisdiction. Rather than appeal the dismissal, Tomko filed a complaint in the Common Pleas Court, alleging discrimination and violation of his constitutional rights, because he did not receive payment for his accrued unused sick leave. He further amended his complaint to add a claim for wrongful termination. The County filed a motion for summary judgment, arguing that Tomko's termination was justified and not discriminatory, and that under the applicable provisions of the Ohio Revised Code, Tomko was not entitled to payment for unused sick time. The trial court agreed and granted

summary judgment in favor of the County. Tomko now appeals, raising two assignments of error.

{¶ 4} An appellate court reviews a trial court’s decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Summary judgment is appropriate when, construing the evidence most strongly in favor of the nonmoving party, (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201, citing *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus.

Wrongful Discharge

{¶ 5} In his first assignment of error, Tomko argues the trial court erred in granting summary judgment in favor of the County on his wrongful termination claim. He contends the trial court erred by not considering evidence in his affidavit regarding his knowledge of other County employees who have been convicted of felonies but have not been terminated from their employment. Tomko argues that by failing to consider this evidence, the trial court failed to recognize the merit to his discrimination and wrongful termination claims.

{¶ 6} The County argues Tomko's claims were properly dismissed because he attempted to bypass the administrative appeal process by amending his complaint to include a wrongful termination claim in the Common Pleas Court. Tomko began the administrative appeal process by filing an appeal with the State Personnel Board of Review ("SPBR"). The SPBR dismissed his appeal for lack of personal jurisdiction pursuant to R.C. 124.34(A), which states, in part, that "[a] person convicted of a felony immediately forfeits the person's status as a classified employee in any public employment on and after the date of the conviction for the felony."

{¶ 7} R.C. 124.34 further states that "[a]n officer or employee may not appeal to the state personnel board of review or the commission any

disciplinary action taken by an appointing authority as a result of the officer's or employee's conviction of a felony." However, the next sentence of R.C. 124.34(A) provides: "[i]f an officer or employee removed under this section is reinstated as a result of an appeal of the removal, any conviction of a felony that occurs during the pendency of the appeal is a basis for further disciplinary action under this section upon the officer's or employee's reinstatement." Thus, on the one hand, R.C. 124.34 provides that a public employee, who is removed for having been convicted of a felony, loses his status as a classified employee in public employment and may not appeal the removal to the state personnel board of review. On the other hand, R.C. 124.34 indicates that despite the prohibition on appeals, a terminated employee may be reinstated during an appeal process. This suggests that an employee may nevertheless appeal his removal to the SPBR.

{¶ 8} Moreover, the order dismissing Tomko's complaint for lack of subject matter jurisdiction advised him of his appeal rights. On the reverse side of the order, it states: "Where applicable, this Order may be appealed under the provisions of Chapter 124 and 119 of the Ohio Revised Code." Although this is boilerplate language, someone from the SPBR apparently filled in the appeal deadline of December 28, 2009, by which SPBR was to receive Tomko's notice of appeal and deposit for an appeal. This notice

advised Tomko that he could appeal by filing a notice of appeal and paying the \$25 administrative costs.

{¶ 9} Tomko failed to exhaust his administrative remedies by filing the instant action without first appealing the SPBR dismissal. The Ohio Supreme Court has firmly established 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, citing *State ex rel. Lieux v. Westlake* (1951), 154 Ohio St. 412, 96 N.E.2d 414. “The purpose of the [exhaustion] doctrine ‘* * * is to permit an administrative agency to apply its special expertise * * * in developing a factual record without premature judicial intervention.’” *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St.3d 109, 111, 564 N.E.2d 477, quoting *S. Ohio Coal Co. v. Donovan* (C.A.6, 1985), 774 F.2d 693.

{¶ 10} Furthermore, even an analysis of the merits of Tomko’s discrimination claim reveals he was not wrongfully terminated. Tomko argues the trial court dismissed his discrimination and wrongful termination claims because it failed to consider his affidavit evidence that he knows several County employees who have not been terminated despite their felony

convictions. He claims this disparate treatment constitutes unlawful discrimination. We disagree.

{¶ 11} In order to establish a prima facie case of discriminatory treatment under R.C. 4112.02(A), a plaintiff must prove that (1) he or she is a member of a protected class, (2) he or she suffered an adverse employment action, (3) he or she was qualified for the position he or she held, and (4) he or she was either replaced by someone outside the protected class or was treated less favorably than a similarly situated employee not in the protected class. *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 1824; *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 421 N.E.2d 128.

{¶ 12} R.C. 4112.02(A), which governs discriminatory practices in employment, prohibits discrimination against an employee on the basis of “race, color, religion, sex, military status, national origin, disability, age, or ancestry * * *.” Because convicted felons are not identified as a protected class, Tomko cannot establish a prima facie case of unlawful discrimination. Furthermore, since R.C. 124.34(A) expressly authorizes the County to terminate an employee who has been convicted of a felony, the County had a legitimate basis for Tomko’s removal.

{¶ 13} Accordingly, the first assignment of error is overruled.

Sick Time Pay

{¶ 14} In his second assignment of error, Tomko argues the trial court erred in finding that he was not entitled to compensation for unused sick time. Tomko contends he is entitled to compensation for unused sick time under R.C. 124.34(A). The County argues that R.C. 124.34(A) expressly bars Tomko from receiving any compensation after removal.

{¶ 15} R.C. 124.34(A) provides that if an employee is removed under R.C. 124.34(A) as a result of being convicted of a felony, the “employee is barred from receiving any compensation after the removal * * *.” However, the next paragraph states that “[a]ny person removed for conviction of a felony is entitled to a cash payment for any accrued but unused sick, personal, and vacation leave as authorized by law.” Tomko asserts that a cash payout is “authorized by law,” because the Ohio Public Employees Retirement System (“PERS”) granted him a “disability retirement” benefit. We agree.

{¶ 16} Once earned, sick leave credits become a vested right that cannot be retroactively revoked. *Ebert v. Stark Cty. Bd. of Mental Retardation* (1980), 63 Ohio St.2d 31, 34, 406 N.E.2d 1098, citing *Barbee v. Omaha* (1977), 199 Neb. 644, 260 N.W.2d 491. The vested right in sick leave credits is governed by R.C. 124.39(B), which, provides, in pertinent part:

“[A]n employee of a political subdivision covered by section 124.38 or 3319.141 of the Revised Code may elect, at the time of retirement from active service with the political subdivision, and with ten or more years of service with the state, any political subdivisions, or any combination thereof, to be paid in cash for one-fourth the value of the employee’s accrued but unused sick leave credit. The payment shall be based on the employee’s rate of pay at the time of retirement and eliminates all sick leave credit accrued but unused by the employee at the time payment is made. An employee may receive one or more payments under this division, but the aggregate value of accrued but unused sick leave credit that is paid shall not exceed, for all payments, the value of thirty days of accrued but unused sick leave.”

{¶ 17} It is undisputed that Tomko had over ten years of service with the County at the time of his removal. R.C. 124.39 defines “retirement” to include disability retirement. Tomko submitted evidence showing that PERS granted him disability retirement. Since “retirement” includes disability, and Tomko received disability retirement from PERS, he is entitled to payment for accumulated unpaid sick leave in accordance with R.C. 124.39(A)(1).

{¶ 18} Accordingly, the second assignment of error is sustained.

{¶ 19} Judgment is affirmed in part and reversed in part. Cause remanded for a determination of the amount of Tomko’s accrued unpaid sick leave in accordance with R.C. 124.39.

It is ordered that appellant and appellee share the 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 common pleas 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.

COLLEEN CONWAY COONEY, JUDGE

JAMES J. SWEENEY, P.J., and
KENNETH A. ROCCO, J., CONCUR