

[Cite as *GMS Mgt. Co, Inc. v. Ohio Civ. Rights Comm.*, 2016-Ohio-7486.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103941

GMS MANAGEMENT CO., INC.

PLAINTIFF-APPELLANT

vs.

OHIO CIVIL RIGHTS COMMISSION, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-820282

BEFORE: Jones, A.J., Kilbane, J., and Stewart, J.

RELEASED AND JOURNALIZED: October 27, 2016

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LARRY A. JONES, SR., A.J.:

{¶1} Plaintiff-appellant, GMS Management Co., Inc., appeals the trial court’s judgment in favor of defendants-appellees, Ohio Civil Rights Commission (“OCRC” or “Commission”) and Ricky Boggs. We affirm.

{¶2} The OCRC is a state agency created to enforce Ohio’s laws against discrimination. Ricky Boggs was employed by the state as an investigator with the OCRC. GMS manages over 3,500 low- and middle-income apartment properties in the state. Thomas Fasanaro, who is on a fixed income and has a physical disability, filled out an application to rent a GMS-managed property. His application was denied.

{¶3} In 2013, Fasanaro filed a charge with the OCRC alleging that GMS denied him housing because he was disabled; Boggs was assigned to investigate Fasanaro’s complaint.

Background

{¶4} Citizens may file charges with the OCRC alleging housing or employment discrimination in person at a regional or satellite office, through the mail, or online.¹ The OCRC also receives cases referred to it from the Department of Housing and Urban Development (“HUD”). Charges are often drafted and submitted by laypersons, many of whom have no experience with the legal system. Commission staff provides

¹The OCRC instituted an online filing process in 2015.

complainants with a questionnaire, which is then reviewed by a Commission investigator. An investigator may meet with the complainant to find out what happened, why the person believes what happened to him or her was discriminatory, and what supporting information or evidence the person has. The investigator will work with the complainant to produce a “charge.”

{¶5} When a charge is received online or from HUD, the complainant has typically not signed the document. The OCRC will mail the charge to the complainant along with a letter explaining that the complainant has to sign it before a notary or an authorized Commission employee. When the person submits a signed and verified charge, it is then sent to the respondent.

{¶6} R.C. 4112.05 provides for a three-stage chronological administrative process, which consists of investigation, conciliation, and adjudication. As part of the investigatory stage, the OCRC offers alternative dispute resolution (“ADR”) in order to facilitate early resolutions of cases. If the parties opt for ADR, it is in the form of mediation, and the investigation is put on hold while the parties work through that process with a mediator.

{¶7} If mediation is successful, the parties either enter into a private agreement or a Conciliation Agreement and Consent Order (“CACO”). The Commission is a party to the CACO and that enables the Commission to file an enforcement action in the event of a breach of the agreement.

{¶8} If mediation fails, the investigation continues. If the Commission finds

probable cause to conclude that unlawful discrimination took place, then the charge enters the second stage, conciliation, and the Commission attempts to eliminate the unlawful discriminatory practice through the informal means of “conference, conciliation, and persuasion.” The investigator drafts the initial proposed conciliation agreement based upon the findings of the investigation. The Commission determines if the unlawful discriminatory practices can be eliminated without the need for a hearing. It is only at the adjudicatory stage where a formal complaint is made by the Commission.

Fasanaro charge

{¶9} Fasanaro filed a charge with the Commission alleging he was disabled, applied for housing at a GMS-managed property, and was denied that housing due to his disability.

Boggs interviewed Fasanaro and secured proof of his income. Boggs then requested information from GMS, including contact information of the other tenants at the apartment complex where Fasanaro had applied for housing.

{¶10} GMS opted for mediation, but no agreement was reached so the matter was returned to Boggs to complete his investigation. Boggs testified that he did not believe GMS was forthcoming with the information he needed for his investigation, so he subpoenaed GMS and the apartment complex’s property manager. GMS then notified the Commission of its intent to file suit. The Commission was unable to complete its investigation within its time parameters, so it closed its file and referred the matter to HUD.

{¶11} In 2014, GMS filed suit, challenging various agency policies and practices.

Specifically, GMS alleged that the OCRC did not comply with the requirement that the charges of unlawful discriminatory practice be made “in writing and under oath,” that its investigations were unduly burdensome, that it used an improper mediation process, and that it deprived GMS of its due process rights. GMS asked the trial court to impose a permanent injunction prohibiting the Commission from acting in any manner not allowed for by statute and to appoint a monitor to ensure compliance.

{¶12} The trial court held a preliminary injunction hearing and denied GMS’s motion for a temporary restraining order. The matter proceeded to a bench trial and the court ruled in favor of the Commission.

{¶13} GMS now appeals and raises seven assignments of error for our review, some of which will be combined for review.

I. The trial court committed reversible error because the [d]ecision does not rationally follow the analysis contained therein.

II. The trial court committed reversible error by refusing to issue declaratory relief.

III. The trial court committed reversible error by failing to declare that a charge signed under penalty of perjury is not under oath, that the OCRC had no jurisdiction to receive or investigate such a charge, that any administrative code provision to the contrary is of no force or effect, that the amendment of such charge is not lawfully effected by a notary merely witnessing a charge signed under penalty of perjury, that the proper amendment of a charge not signed under oath cannot relate back to the date of the original filing of such a charge and any administrative code provision to the contrary is of no further force or effect, and that conduct pursuant to illegal regulations is an abuse of discretion and must be enjoined.

IV. The trial court committed reversible error by failing to declare that the OCRC is prohibited from conciliation — by any name — unless and until all of the statutory prerequisites therefore have been fulfilled, i.e., the

completion of an investigation of housing discrimination which results in a finding of probable cause that such discrimination occurred, as well as the initiation of a complaint to be conciliated.

V. The trial court failed to declare whether either of the two purported amended charges are under oath.

VI. The trial court committed reversible error by dismissing Appellee Boggs.

VII. The trial court committed reversible error by failing to find that appellant is the prevailing party.

The Oath Requirement

{¶14} In the first and fifth assignments of error, GMS argues that the trial court erred when it found that the “oath requirement” on a charge had been fulfilled because the court initially ruled that the phrase “under the penalty of perjury” was not equivalent to an “oath” under Ohio law; therefore, it was required to enjoin the Commission from investigating the charge. GMS also challenges the oath requirement in the second assignment of error, contending that the Commission enacted an administrative rule that conflicted with a statute.

{¶15} R.C. 4112.05(B)(1) requires that a charge be in writing under oath. Ohio Adm.Code 4112-3-01 provides that any housing discrimination charge shall be “signed and affirmed by the complainant” and shall state “I declare under penalty of perjury that the foregoing is true and correct.”

{¶16} Administrative rules are designed to accomplish the ends sought by the legislation that has been enacted by the General Assembly. *State ex rel. Am. Legion Post*

25 v. *Ohio Civ. Rights Comm.*, 117 Ohio St.3d 441, 2008-Ohio-1261, 884 N.E.2d 589, ¶ 14, citing *Carroll v. Dept. of Adm. Serv.*, 10 Ohio App.3d 108, 110, 460 N.E.2d 704 (10th Dist.1983). Therefore, “[r]ules promulgated by administrative agencies are valid and enforceable unless unreasonable or in conflict with statutory enactments covering the same subject matter.” *Am. Legion Post 25 at id.*, citing *State ex rel. Curry v. Indus. Comm.*, 58 Ohio St. 2d 268, 269, 389 N.E.2d 1126 (1979). The commission is authorized to adopt rules to implement the provisions of R.C. Chapter 4112. *Am. Legion Post 25 at id.* However, an administrative rule may not add to or subtract from a legislative enactment. *Cent. Ohio Joint Vocational School Dist. Bd. of Edn. v. Ohio Bur. of Emp. Serv.*, 21 Ohio St.3d 5, 10, 487 N.E.2d 288 (1986). If it does, the rule clearly conflicts with the statute, and the rule is invalid. *Am. Legion at id.*, citing *Cent. Ohio*.

{¶17} GMS argues that Ohio Adm.Code 4112-3-01 is in conflict with R.C. 4112.05, therefore, the rule is invalid. Because the rule is invalid, GMS claims, the Commission did not have jurisdiction over the Fasanaro charge or any other charges for which the Commission received a signature that was not under oath.

{¶18} As mentioned, during the pretrial process, the trial court ruled that the statement “under oath” and “under penalty of perjury of law” were not equivalent and a declaration made under the penalty of perjury did not invoke the jurisdiction of the Commission. The trial court later ruled that the oath requirement had been met.

{¶19} Black’s Law Dictionary defines an “oath” as follows:

1. A solemn declaration, accompanied by a swearing to God or a revered person or thing, that one’s statement is true or that one will be bound to a

promise. · The person making the oath implicitly invites punishment if the statement is untrue or the promise is broken. The legal effect of an oath is to subject the person to penalties for perjury if the testimony is false * * * 2. A statement promise made by such a declaration. 3. A form of words used for such a declaration. 4. A formal declaration made solemn without a swearing to God or a revered person or thing.

Black's Law Dictionary (9th Ed.2009).

{¶20} It defines an “affirmation” as “[a] solemn pledge equivalent to an oath but without reference to a supreme being or to swearing; a solemn declaration made under penalty of perjury, but without an oath.” *Id.* While an oath is “sworn to,” an affirmation is merely “affirmed”; but either type of pledge may subject the person making it to the penalties for perjury. *Id.*

{¶21} The Ohio Supreme Court has held that an unsworn written statement that is signed under penalty of perjury may not be substituted for a sworn affidavit. *Toledo Bar Assn. v. Neller*, 102 Ohio St.3d 1234, 2004-Ohio-2895, 809 N.E.2d 1152, ¶ 1. In *Neller*, a disbarred attorney sent to the clerk of the Ohio Supreme Court a signed document in which the attorney “state[d] and declare[d] under the penalties of perjury” that his statements in the documents were “true and correct.” *Id.* at ¶ 7. The court found that a strict and traditional reading of the term “affidavit,” was consistent with the court’s “longstanding insistence that only a written declaration made under oath before a proper officer qualifies as an ‘affidavit.’” *Id.* at ¶ 24.

{¶22} The OCRC charge form Fasanaro signed stated: “I declare under penalty of perjury that I have read this charge (including attachments) and that it is true and correct.”

The trial court initially determined that this was insufficient to show that Fasanaro, or

other complainants, had signed under oath, but eventually determined that the deficiencies had been remedied. Nevertheless, we find that swearing under the penalty of perjury is sufficient to invoke the jurisdiction of the OCRC.

{¶23} In *Baker v. Siemens Energy & Automation*, 820 F.Supp. 1050, 1057 (S.D.Ohio 1993), the OCRC received a registered letter from the complainant setting forth his dispute. The letter was signed by the complainant. In the letter, the complainant asked that it (the letter) constitute a charge with the OCRC. The district court concluded that the complainant had filed a charge with the OCRC even though the letter he sent was not under oath, citing R.C. 4112.08 (“the provisions of sections 4112.01 to 4112.08 of the Revised Code shall be construed liberally for the accomplishment of the purpose thereof”).

In *Ackman v. Ohio Knife Co.*, 589 F.Supp. 768, 770 (S.D.Ohio 1984), the court found that all that a claimant is required to do is present the state agency with a written and signed statement describing his or her claim of discrimination to invoke the jurisdiction of the Commission.

{¶24} We are reminded that the Revised Code provides that the provisions covering the OCRC shall be construed liberally for the accomplishment of its purposes. R.C. 4112.08. Thus, consistent with the holdings of the Sixth District and the legislature’s overarching purpose for the OCRC, we find that “under the penalty of perjury” was sufficient to invoke the Commission’s jurisdiction.

{¶25} Boggs testified that he administered an oath to Fasanaro, observed his signature, and counter-signed the first amended charge. He also received the second

amended charge, which had been signed by Fasanaro and notarized. GMS provided no evidence to dispute the Commission's evidence that the charge was otherwise improperly sworn to.

{¶26} Thus, we find that the trial court did not err when it found that the oath requirement had been met or that Ohio Adm.Code 4112-3-01 did not conflict with R.C. 4112.05. In light of the above, the first and fifth assignments of error are overruled. The second assignment of error, as it relates to the oath requirement, is also overruled.

Declaratory Judgment

{¶27} In the second assignment of error, GMS claims that the trial court abused its discretion in not issuing the declarations that it requested.

{¶28} “A proper claim for declaratory judgment must present: (1) a real controversy between the parties; (2) a controversy which is justiciable in character; and (3) a situation in which speedy relief is necessary to preserve the rights of the parties.” *Peat Marwick Main & Co. v. Elliott*, 10th Dist. Franklin No. 90AP-921, 1991 Ohio App. LEXIS 101, *4-5 (Jan. 10, 1991), citing *Burger Brewing Co. v. Liquor Control Comm.*, 34 Ohio St.2d 93, 97, 296 N.E.2d 261 (1973). A trial court's determination regarding the justiciability of a declaratory judgment action is reviewed for an abuse of discretion. *M6 Motors, Inc. v. Nissan of N. Olmsted, LLC*, 2014-Ohio-2537, 14 N.E.3d 1054, ¶ 20 (8th Dist.), citing *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586.

{¶29} During the pretrial process, the Commission moved to dismiss GMS's complaint and moved for summary judgment, arguing that the matter was moot because

the Commission was no longer handling the Fasanaro matter. GMS argued that it was seeking a declaration as to the “lawfulness and constitutionality” of the OCRC’s investigatory conduct as a whole, not solely as to Fasanaro’s charge, therefore, its case was not moot. The trial court denied GMS’s motions and went forth with hearing the matter and deciding the case.

{¶30} On appeal, GMS argues that the trial court failed to declare the rights of the parties as to the constitutionality of the OCRC’s investigative conduct, the constitutionality of an administrative regulation that conflicted with a statute, the “efficacy” of the OCRC’s contract with HUD, and whether the OCRC had jurisdiction to conduct its investigation.

{¶31} The trial court presided over both the preliminary junction hearing and the bench trial. GMS may not agree with the outcome of the matter, but the trial court heard the action and issued a judgment that declared the rights and obligations of the parties.

{¶32} In light of the above, the trial court did not abuse its discretion and the second assignment of error is overruled.

OCRC Investigation and Filing date

{¶33} In the third assignment of error, GMS challenges the information that the OCRC is entitled to obtain in its investigations and claims that a “defective” oath leaves the Commission without jurisdiction over a charge.

{¶34} First, as to the alleged defective oaths, the trial court specifically noted that the OCRC had taken steps to remedy any problems by updating its forms and filing a list of persons authorized to administer oaths with the Ohio Secretary of State. We do not

find that the trial court abused its discretion in finding this to be sufficient to confer jurisdiction to the OCRC over a complainant's charges, especially given the fact that we found that the form that Fasanaro signed was sufficient to confer jurisdiction.

{¶35} GMS also challenges the information that the OCRC gathers as part of its investigations, i.e., how it investigates charges and conducts its investigations. But it is well established that the OCRC has the discretion to investigate a charge and determine whether there is probable cause that unlawful discrimination occurred. *See McCrea v. Ohio Civ. Rights Comm.*, 20 Ohio App.3d 314, 317, 486 N.E.2d 143 (9th Dist.1984) (The courts grant discretion to the Commission in determining whether to find probable cause.); *State ex. rel. Westbrook v. Ohio Civ. Rights Comm.*, 17 Ohio St.3d 215, 216, 478 N.E.2d 799 (1985) (The Commission has the discretion to decide whether to investigate a charge and to issue a complaint based on that charge.).

{¶36} R.C. 4112.04(B)(3)(a) provides, in part, that the Commission may subpoena witnesses and require the production of any books and papers relating to any matter under investigation, as well as:

(a) In conducting a hearing or investigation, the commission shall have access at all reasonable times to premises, records, documents, individuals, and other evidence or possible sources of evidence and may examine, record, and copy the premises, records, documents, and other evidence or possible sources of evidence and take and record the testimony or statements of the individuals as reasonably necessary for the furtherance of the hearing or

investigation. In investigations, the commission shall comply with the fourth amendment to the United States Constitution relating to unreasonable searches and seizures. The commission or a member of the commission may issue subpoenas to compel access to or the production of premises, records, documents * * *.

{¶37} While GMS might find some of the Commission's investigative techniques time consuming and burdensome, GMS is unable to show that the Commission's investigations violated the Fourth Amendment or otherwise fell outside the scope of what is permitted under statute.

{¶38} In light of the above, the third assignment of error is overruled.

Mediation and Conciliation

{¶39} In the fourth assignment of error, GMS argues that the trial court erred by failing to declare that the Commission is prohibited from a conciliation agreement until a probable cause finding has been made and a complaint has been filed.

{¶40} As mentioned, the OCRC offers mediation as its means of alternative dispute resolution prior to or after preliminary investigation, and prior to conciliation and adjudication. GMS claims that the OCRC should have been enjoined from offering mediation prior to completing its investigation because successful mediation always results in a conciliation agreement.

{¶41} We agree with the Commission that GMS conflates the two phases of mediation and conciliation. Although successful mediation *may* result in a conciliation

agreement (a COCA) in which the Commission remains a party, that agreement is different than the process of conciliation as set forth in R.C. 4112.05(A). R.C. 4112.05(A) provides that the Commission “before instituting the formal hearing * * * * shall attempt, by informal methods of conference, conciliation, and persuasion, to induce compliance with this chapter.”

{¶42} Conciliation occurs only after the investigatory phase has concluded and the Commission finds probable cause to conclude that an unlawful discriminatory practice took place. Mediation occurs before or during the investigation phase and prior to a probable cause finding. The Commission’s investigator is not involved in the mediation process, but is involved in the conciliation process because the investigator is the person who drafts the initial proposed conciliation agreement based upon the findings of the investigation.

{¶43} As both GMS and the Commission noted, the parties are not required to mediate, nor are they required to execute a conciliation agreement in which the Commission remains a party for enforcement purposes. It is only after the alternative dispute resolution and conciliation processes fail that the Commission moves on to the adjudicatory phase and a complaint is filed.

{¶44} “Settlement and compromise are highly favored by the law.” *Murray v. Murray*, 6th Dist. Lucas No. L-09-1305, 2011-Ohio-1546, ¶ 21, citing *State ex rel. Wright v. Weyandt*, 50 Ohio St.2d 194, 197, 363 N.E.2d 1387 (1977). Mediation is “a procedure by which the parties negotiate a resolution to their dispute with the assistance of a third

party mediator. If the parties do not reach an agreement, the mediation process is at an end; no resolution may be imposed on the parties.” *Oliver Design Group v. Westside Deutscher Frauen-Verein, d.b.a. The Altenheim*, 8th Dist. Cuyahoga No. 81120, 2002-Ohio-7066, ¶ 12. Boggs testified that three out of four of the Commission’s cases are settled through mediation.

{¶45} In light of the above, GMS has not shown how the process by the OCRC deprived it of due process; therefore, the trial court did not abuse its discretion in granting judgment in favor of the Commission. The fourth assignment of error is overruled.

Dismissal of Charge Against Boggs

{¶46} In the sixth assignment of error, GMS claims that the trial court erred by dismissing the Commission’s investigator, Boggs. As the trial court noted in its decision, GMS failed to bring any individual claims against Boggs. GMS does not show why the suit against Boggs should not have been dismissed. We find no error in the trial court’s decision. The sixth assignment of error is overruled.

Attorney Fees

{¶47} In the seventh assignment of error, GMS claims that it is entitled to attorney fees because, GMS alleges, the OCRC did change some of its practices as a result of the instant case. We disagree.

{¶48} R.C. 2335.39 provides that a prevailing party in a civil action may be entitled to recover attorney fees from the state. GMS argues that it was truly the prevailing party because the Commission began to require that charges be signed under oath and changed

its behavior based on this lawsuit.

{¶49} An award of attorney fees is governed by the Supreme Court decision in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001). The plaintiff argued that it was entitled to an award of attorney fees under the “catalyst theory,” which theorizes that a plaintiff is the prevailing party entitled to fees if the lawsuit brought about the desired result through a voluntary change in the defendant’s behavior. But the *Buckhannon* Court rejected that proposition, holding that only “enforceable judgments on the merits and court-ordered consent decrees create the material alteration of the legal relationship of the parties necessary to permit an award of attorney fees.” *Id.* at 604.

{¶50} The trial court entered judgment in favor of the Commission. GMS did not obtain an enforceable judgment on the merits or a court-ordered consent decree, thus, GMS is not eligible for attorney fees. Accordingly, the trial court’s determination in this matter did not constitute an abuse of discretion. The seventh assignment of error is overruled.

{¶51} Judgment affirmed.

It is ordered that appellees recover of appellant 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.

LARRY A. JONES, SR., ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and
MELODY J. STEWART, J., CONCUR