[Cite as *Parham v. Jo-Ann Stores, Inc.*, 2009-Ohio-5944.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

LAURIE LEE PARHAM	C.A. No. 24749
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
JO-ANN STORES, INC.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CV 2008-07-4847

DECISION AND JOURNAL ENTRY

Dated: November 10, 2009

CARR, Presiding Judge.

{¶1} Appellant, Laurie Parham, appeals the judgment of the Summit County Court of Common Pleas, which granted summary judgment in favor of appellee, Jo Ann Stores, Inc. ("Jo Ann"). This Court affirms.

I.

{¶2} Parham began working at Jo Ann on January 23, 1995, as a union employee. Her most recent job was that of Replenisher, which required upper extremity pushing and pulling, as well as lifting and carrying of objects up to one hundred (100) pounds.

{¶3} Jo Ann is a self-insured employer for purposes of workers' compensation, meaning the company pays workers' compensation claims out of its own financial resources. In 1997, Parham suffered a work-related back injury, and filed a claim for and received workers' compensation benefits. In 1998, she suffered a work-related injury to her elbow, and filed a claim for and received workers' compensation benefits for that claim as well. Despite surgeries

in 2001 and 2004, she continued to suffer problems as a result of her elbow injury. On September 13, 2005, after receiving notice from Parham's doctor that she was under temporary light duty restrictions, Jo Ann offered Parham a temporary "bridge assignment" which was designed to bridge the gap between the time she was limited due to temporary work restrictions and when she was able to resume the physical duties of her regular job.

{¶4} On February 16, 2006, Parham submitted a Physician's Report of Work Ability, which indicated for the first time that her restrictions were permanent in nature, rather than temporary. She was restricted from lifting, pushing, and pulling objects in excess of ten (10) pounds. Once her restrictions became permanent, rather than temporary, Parham was no longer eligible for any bridge assignments.

{¶5} On March 2, 2006, Parham was called to a meeting with representatives from the human resources department and the union, as well as her supervisor, at which time she was informed that she was being placed on a compelled workers' compensation leave of absence. Parham signed the People Action Form placing her on leave of absence. The reason noted on the form for this action was that Jo Ann could not accommodate her restrictions.

{¶6} On March 3, 2006, Parham filed a grievance regarding her placement "on a leave of absence due to [her] workers comp. injury sustained as a fabric Replenisher." She noted that she had been performing a light duty assignment as a slot checker since her return from surgery in September 2005. Parham wrote, "As of Feb 16th my injury was deemed permanent and now my employer has no work for me. I believe there are jobs I can do with my restrictions such as bander, add on line, and slot checks." In the "Solution" section of the grievance form, Parham wrote, "I want my job back and to be made whole." Her grievance was denied upon a finding that Parham's February 16, 2006 permanent restrictions could not be accommodated.

{¶7} On May 25, 2006, Parham submitted a subsequent Physician's Report of Work Ability, which indicated that she was able to return to work at that time with restrictions that she not lift anything over 35 pounds and that she not engage in any repetitive or resistive motion. Her restrictions were again classified as permanent.

{¶8} On October 16, 2006, Parham's attorney sent a letter without her input or knowledge to Jo Ann, advising the employer that Parham, its "former employee," would be filing a lawsuit for constructive discharge and workers' compensation retaliation pursuant to R.C. 4123.90. The attorney asserted that Parham was constructively discharged on October 16, 2006, "since it is now apparent the employer has abandoned the employee."

{¶9} Parham filed a complaint alleging one claim of workers' compensation retaliation in violation of R.C. 4123.90 and one claim of wrongful discharge in violation of public policy. Parham voluntarily dismissed her complaint on July 17, 2007. On July 8, 2008, she refiled her complaint, alleging only a claim for workers' compensation retaliation in violation of R.C. 4123.90. She alleged that Jo Ann told her to leave the premises because the employer "could not currently accommodate her worker's compensation related injury by providing her with suitable employment." Parham alleged that Jo Ann's reason was merely "a pretext for retaliation ***." Parham alleged that Jo Ann's failure to recall her to work effected a constructive discharge "which became apparent by October of 2006 when the Defendant Jo Ann continued to refuse to recall the Plaintiff." Jo Ann answered, raising numerous affirmative defenses, including lack of subject matter jurisdiction, untimely notice pursuant to R.C. 4123.90, and the running of the statute of limitations.

{¶10} Jo Ann filed a motion for summary judgment. Parham responded, Jo Ann replied, and Parham filed a sur-reply. The trial court granted summary judgment in favor of Jo Ann,

concluding that it lacked jurisdiction to entertain the complaint because Parham sent notice to Jo Ann of its alleged violation of R.C. 4123.90 outside the 90-day period and filed her complaint outside the 180-day period for doing so. Parham filed a timely appeal, raising one assignment of error for review.

ASSIGNMENT OF ERROR

> "THE TRIAL COURT REVERSIBLY ERRED WHEN IT DISMISSED PLAINTIFF-APPELLANT LAURIE PARHAM'S CIVIL ACTION ALLEGING A VIOLATION OF OHIO R.C. 4123.90 AGAINST DEFENDANT-APPELLEE JO ANN STORES, INC. FOR THE REASON THAT THE SAME WAS BARRED BY THE NOTICE AND LIMITATIONS PERIOD OF 90 & 180 DAYS SET FORTH IN THE STATUTE."

{¶11} Parham argues that the trial court erred by granting summary judgment in favor of Jo Ann and dismissing her complaint for lack of jurisdiction. This Court disagrees.

{¶12} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶13} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> "(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 such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶14} To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.

Dresher v. Burt (1996), 75 Ohio St.3d 280, 293. Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 449.

{¶15} Parham alleged Jo Ann violated R.C. 4123.90 which states in relevant part:

> "No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings 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. Any such employee may file an action in the common pleas court of the county of such employment in which the relief which may be granted shall be limited to reinstatement with back pay, if the action is based upon discharge, or an award for wages lost if based upon demotion, reassignment, or punitive action taken, offset by earnings subsequent to discharge, demotion, reassignment, or punitive action taken, and payments received pursuant to section 4123.56 and Chapter 4141. of the Revised Code plus reasonable attorney fees. The action shall be forever barred unless filed within one hundred eighty days immediately following the discharge, demotion, reassignment, or punitive action taken, and no action may be instituted or maintained unless the employer has received written notice of a claimed violation of this paragraph within the ninety days immediately following the discharge, demotion, reassignment, or punitive action taken."

{¶16} The Ohio Supreme Court has held that "[s]tatutory provisions *** that set forth timely filing requirements go to the core of procedural efficiency. We have read such provisions as mandatory and jurisdictional, and the failure to fully comply with such requirements properly leads to dismissal." *Hafiz v. Levin*, 120 Ohio St.3d 447, 2008-Ohio-6788, at ¶8. Specifically within the context of R.C. 4123.90, this Court has held:

> "'Where by statute a right of action is given which did not exist at common law, and the statute giving the right fixes the time within which the right may be

> enforced, the time so fixed becomes a limitation or condition on such right and will control. In such a case time is made of the essence of the right created, and the limitation is an inherent part of the statute or agreement out of which the right in question arises, so that there is no right of action whatever independent of the limitation and a lapse of the statutory period operates to extinguish the right altogether. If a cause of action arising out of a special statute containing limitations qualifying the right is not brought within the time limited in the statute, the court has no jurisdiction of the case.'" *Griffith v. Allen Trailer Sales* (Oct. 18, 1984), 9th Dist. No. 3630, quoting 34 Ohio Jurisprudence 2d (1958), 505-506, Limitation of Actions, Section 19.

{¶17} Furthermore, we have held:

> "Compliance with the time of filing, the place of filing, and the content of the notice as specified in the statute are all conditions precedent to jurisdiction. *** A failure to file the written notice of a claimed violation of R.C. 4123.90 within ninety days of [the violative act] is a jurisdictional defect." *Cross v. Gerstenslager* (1989), 63 Ohio App.3d 827, 829-30.

{¶18} In this case, Parham alleged that she was forced to take a leave of absence from her employ on March 2, 2006, and that Jo Ann's reason that it could not accommodate her physical restrictions was merely a pretext for retaliation for Parham's having filed claims for and received workers' compensation benefits. Parham filed a grievance on March 3, 2006, as a result of Jo Ann's placing her on leave of absence. Parham testified during her deposition that she was upset when the company placed her on a leave of absence "[b]ecause I was not going to have any money, they were taking me out of my income." Accordingly, Parham's March 2, 2006 compelled leave of absence constitutes the "punitive action" underlying her R.C. 4123.90 retaliation complaint.

{¶19} Parham alleged in her complaint and further admitted in Jo Ann's request for admissions that she first sent the employer the ninety-day litigation warning notice for purposes of R.C. 4123.90 on October 16, 2006. Because Parham did not give the requisite notice until 228 days after the alleged punitive action, she did not comply with the statutory time limitations for notice. Parham's initial complaint is not in the record. However, even if she filed that complaint

the same day she served notice to Jo Ann of her intent to file, her complaint would have been filed 48 days beyond the 180-day statutory period. In both cases, Parham failed to meet the statutory limitations periods. Accordingly, the trial court did not err by granting Jo Ann's motion for summary judgment and dismissing Parham's complaint for lack of jurisdiction.

{¶20} Parham argues, however, that Jo Ann engaged in a continuing violation of R.C. 4123.90 by continuing to fail to call her back to work. Accordingly, she argues that the statute of limitations was tolled until it somehow became "apparent" on October 16, 2006, that the employer had "abandoned" Parham. As in *Griffith*, supra, Parham argues that the statutory time limitations should not begin to run until she is aware of all facts essential to her cause of action. However, this Court clearly declined to engraft a "discovery rule" on the time limitations enunciated in R.C. 4123.90. Id. Therefore, any alleged retaliatory motives Parham may have discovered beyond the ninety days after her compelled leave of absence do not serve to extend the limitations period.

{¶21} The United States Court of Appeals for the Sixth Circuit has also recognized that "Ohio courts have refused to apply the discovery rule in R.C. 4123.90 cases." *Jakischa v. Cent. Parcel Express* (C.A.6, 2004), 106 Fed.Appx. 436, 441. As in *Jakischa*, however, even were we to consider Parham's "discovery of retaliatory intent for constructive discharge" argument on the merits, it has no evidentiary support because "[i]t is based entirely on mere allegation[] [which] falls far short of meeting [her] burden of proving that [s]he met the notice provision with competent evidence." Id. This is particularly so where Parham's filing of a grievance on March 3, 2006, the day after she was placed on involuntary leave of absence because the company was unable to accommodate her permanent restrictions, "[is] evidence tending to show that [Parham] knew that [her] layoff was permanent." See id.

{¶22} Moreover, Parham testified during her deposition that she was not aware of, nor did she see, the October 16, 2006 letter her attorney sent to Jo Ann until some time later. In the letter, the attorney described Parham as a "former employee" who was constructively discharged as of the date of the letter. During her deposition, Parham denied quitting her job in October 2006, and testified that she was confused and did not know whether she ever resigned, or felt compelled to resign, her employment.

{¶23} In addition, Parham testified during her deposition that, after she was placed on leave of absence, she never spoke with the union representative about returning to work. She testified, however, that she believed that she spoke once with the human resources manager, Mr. Carpenter, about returning to work after she submitted a May 25, 2006 doctor's report. That report also classified her restriction as permanent. Mr. Carpenter averred in his affidavit that he told Parham he would reevaluate her status upon her request if her restriction changed. Her restriction was never either terminated or modified from permanent to temporary.

{¶24} Despite her deposition testimony, Parham subsequently averred in an affidavit that she made "numerous attempts to return to work with Jo Ann by repeatedly calling H.R. manager Zachary Carpenter seeking job availability information for months after [her] departure ***." She also averred that she realized that she was constructively discharged on October 16, 2006, when it became clear that Jo Ann was ignoring her repeated requests to return to work. Although she averred that she did not learn until May 2007, that Jo Ann intended to fire her, she swore: "I submit that when an employer refuses to let me work for them, and will not pay me a wage, and lies to me about their intentions to return me to work I am constructively discharged when I am put on notice of these facts, which was not until October of 2006." (sic)

{¶25} This Court has held:

> "An affidavit of a nonmoving party that contradicts earlier deposition testimony without sufficient explanation for the inconsistency cannot establish a genuine issue of material fact. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, at ¶28-29. Consideration of an inconsistent affidavit offered by a nonmoving party requires two steps. In the first, we must determine whether the statements in the affidavit contradict or merely supplement the affiant's earlier testimony. Id. at ¶26. In the second step, we consider whether the affiant has offered a sufficient explanation for the inconsistency. Id. at ¶27-28. 'A nonmoving party's contradictory affidavit must sufficiently explain the contradiction before a genuine issue of material fact is created.' Id at ¶29." *Craddock v. The Flood Co.*, 9th Dist. No. 23882, 2008-Ohio-112, at ¶15.

{¶26} In this case, Parham's affidavit contradicts her earlier deposition testimony. In addition, the affidavit contains no explanation for the inconsistencies. Accordingly, it may not be considered for the creation of a genuine issue of material fact as to the timeliness of Parham's notice or filing of the action for purposes of R.C. 4123.90.

{¶27} Based on the above reasoning, this Court concludes that the trial court properly granted summary judgment in favor of Jo Ann and properly dismissed Parham's complaint for lack of jurisdiction because Parham failed to comply with the statutory notice and filing limitations contained in R.C. 4123.90. Parham's assignment of error is overruled.

III.

{¶28} Parham's sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
CONCURS

BELFANCE, J.
CONCURS, SAYING:

{¶29} I concur. I write separately to state that, under certain circumstances, it is possible that an employer's repeated refusals to allow an employee to return to work after filing a worker's compensation claim may evidence an employer's improper motives only after multiple refusals have occurred. Furthermore, successive and repeated conduct on the part of the employer may ultimately form the basis of an R.C. 4123.90 claim. See *Potelicki v. Textron, Inc.* (Oct. 12, 2000), 8th Dist. No. 77144, at *4, citing *Harvey v. Capital Fire Protection Co.* (Aug. 27, 1985), 10th Dist. No. 85AP-494, at *2 (When employer repeatedly refuses to allow employee

to return to work after receipt of workers' compensation, each subsequent refusal may form the basis of an R.C. 4123.90 claim.). I agree that in this case, Parham did not adequately meet her burden of production in response to Jo Ann's motion for summary judgment as she testified in her deposition that, with the exception of one discussion on May 25, 2006, she never spoke with the union representative about returning to work after she was placed on leave of absence.

APPEARANCES:

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